Supreme Court, U.S.
FILED
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No. 04-1555

In the Supreme Court of the United States

HOFFINGER INDUSTRIES, INC., ET AL.

Petitioner,

v.

LESSA BUNCH, A MINOR, ETC., AND MCMASKER ENTERPRISES, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Constitutionally protected right to due process of law ensure the right: (i) to present probative evidence in defense; and (ii) to enforcement of a settlement agreement by a third party beneficiary.

CORPORATE DISCLOSURE STATEMENT

Hoffinger Industries is the parent corporation relevant to these defendants. There are no publicly held corporations with over 10% ownership in the company.

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OFFICIAL AND UNOFFICIAL FINDINGS/OPINIONS FROM UPON WHICH PETITION IS BASED:

1. Judgment; In the Superior Court of Glenn County, State of California.....8/23/2001;

2. Opinion Affirming Trial Court: California Court of Appeal.....11/08/2004;

3. Denial of Motion for Rehearing: California Court of Civil Appeal.....12/07/2004;

4. Denial of Petition for Review; California Supreme Court .....2/16/2005.

JURISDICTIONAL STATEMENT

Judgment was entered on August 23, 2001 and the trial court's decision affirmed by the California Court of Appeal on November 8, 2004;

Rehearing was denied in the California Court of Appeal on December 7, 2004. Petitioner's Petition for Writ of Review to the California Supreme Court was denied on February 16, 2004;

Jurisdiction is conferred on this Court though 28 U.S.C. §1257(a) which states as follows: Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

United States Constitution, 14th Amendment, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. *Factual Summary*

This case is about a simple product, an above ground swimming and wading pool, which was made to the specifications established by the United States Consumer Product Safety Commission, the American National Standards Institute, and the National Swimming Pool Institute. The pool was safe for its intended use.

In the fall of 1988 or spring of 1989, Joe and Lorretta Frank purchased, from McMasker Enterprises d/b/a Waterworks (hereinafter referred to as "McMasker"), in an open/unsealed box, a Doughboy replacement pool liner kit for their Coleco above-ground pool. (A209-A211, A225-A226.) The Franks chose to install the pool liner themselves. (A211-A212.) The Doughboy replacement pool liner kits produced in 1988/89 were identical to the liner that came with the original pool; the installation instructions, and safety labels were consistent with the systems and warnings used by every pool liner manufacturer at that time. (A219-A224, A226-A232.) The Petitioner's safety labels which were in the pool liner package stated that crippling injury may result and had a picture of a wheel chair on the label. *See, e.g.*, Defendant Hoffinger's Opening Statement. (A203.)

Although the installation instructions -- to assure effectiveness and readability-- specifically required the safety labels to be affixed to the pool liner once the flexible liner was stretched into place and the water line could be determined, Joe and Loretta Frank did not follow the instructions and chose not to install any of the labels as they believed the "no diving, shallow water" labels already affixed to the Coleco pool frame and verbal warnings were sufficient to prevent swimmers from diving. (A215-A216,

A226-A228, A230, A265-A268, A268-A269; A120-A121.) They made this decision even though the instructions stated that the application of the warning labels was a mandatory step in the installation process and that the failure to do so voided all warranties provided by the manufacturer. (A215-A216, A226-A228, A230, A265-A268, A268-A269.) According to Mr. Frank's testimony, he received warning labels stating "4 feet deep, no diving" with the liner kit but failed to utilize them until after Leesa Bunch's accident. (A229-A230.)

In addition to the "no diving, shallow water" signs on the Coleco pool frame, Mrs. Frank made sure to take each child who came to swim at her home by the hand, walk them to the edge of the pool and tell them "the pool is shallow, there is no deep end, there is no diving because you could hurt [herself]." (A212-A213, A217-A218.) The Franks and their guests continued to use the Coleco pool with the replaced liner for an additional four to five years without incident or injury. (A211-A212, A225.)

On August 13, 1993, eleven year old Leesa Bunch (hereinafter "Respondent"), nine year old Erick Bunch, eleven year old Tyler Breeding, and nine year old Travis Breeding joined Josh Frank at his home to go swimming in the Franks above ground pool. (A235-A237, A269-A270.) In addition to the "no diving, shallow water" warnings on the pool frame and on the pool ladder, Mrs. Frank also took Respondent by the hand, walked her to the edge of the pool and told her to remember the rules: it is shallow, no diving. (A217-A218.) At some point, Mrs. Frank went inside her home and left the young children to swim and play outside unsupervised. (A213-A215.) Once Mrs. Frank was out of sight, Respondent began diving into the Franks' above-ground pool from the edge of the surrounding deck – she suffered no injury during these repeated dives. (A232-A234, A237-A238, A271-A273, A275.)

At some point, Respondent decided to further ignore the specific instructions she had received and the warnings she admittedly observed on the inside pool railings, the top side of the railings and the rungs of the pool ladder. Respondent dragged a bench – not manufactured by Petitioners – to the edge of the pool deck (also not manufactured by Petitioners), climbed up and flung herself head first with her hands by her sides into the shallow, above-ground pool. (A234-A235, A238-A240, A241-A243, A272-A274.) Tragically, this choice exposed Respondent's head and neck to the force of a headlong leap with her head starting from a point some five to six feet above the water surface; her head and neck struck the hard ground beneath the liner of the pool, known to be of very shallow depth. (A211-A212.) Fortunately for Respondent, Erick Bunch and Tyler Breeding were able to rescue her from the pool. (A274-A275.) Respondent was taken to the hospital where she and her family learned she had suffered a severe fracture to her C-3 vertebra rendering her a quadriplegic. (A203-A207.)

After the accident, Respondent settled, without suit, her claims for negligent supervision and premises liability against the homeowners, Joseph and Lorretta Frank, for the amount of $300,000.00. (A56-A57, A58-A60.) On May 1, 1997, Respondent filed a Complaint for Personal Injuries against Hasbro, K-Mart Corporation, Montgomery Ward, Ranger (successor to Coleco) and SLM International in Glenn County Superior Court. (A52-A53.) After Montgomery Ward informed Respondent of its intent to remove the case to federal court, Respondent added McMasker as a non-diverse defendant. (A55-A56.) Shortly thereafter, Respondent settled with Ranger for the amount of $350,000.00. (A61-A63, A64-A66.)

On or about August 7, 1998, after McMasker failed to answer Respondent Bunch's amended complaint, the

Glenn County Superior Court granted Respondent's Application for Default against McMasker and awarded default judgment in the approximate amount of $20,000,000.00. (A69-A71.) On October 15, 1998, McMasker filed a Motion for Relief from the Default Judgment accompanied by a proposed answer. (A72-A74.) On January 1, 1999, a Notice of Settlement was filed by McMasker indicating a settlement for $1,000,000.00, an amount equal to McMasker's liability insurance policy limits. (A75-A76.) On April 21, 1999, McMasker, having sold the pool liner kit in an unsealed, open carton, nonetheless filed a Cross-Complaint for Implied Indemnity, Comparative Indemnity, Equitable Distribution, and Declaratory Relief against Petitioners. (A77-A78.) The settlement monies received by Respondent up to that time totaled $1,978,000.00, just $800,000.00 less than the amount requested by Respondent at trial. (A56-A57, A58-A60, A64-A66, A79-A84, A89-A90.)

Almost six months later, after learning that McMasker had filed a cross-claim against Hoffinger Industries, Inc., Doughboy Recreational Inc., and Golden West Marketing ("Petitioners"), on November 1, 1999, Respondent amended her original complaint to name Petitioners as Doe Defendants. (A85-A86.) On November 19, 1999, Montgomery Ward settled with Respondent for the amount of $328,800.00, and on January 20, 2000, the case against Montgomery Ward was dismissed. (A91-A97.) In November, 2000, Petitioners filed a Motion for Summary Judgment and a Memorandum of Points and Authorities In Support of Defendants' Motion for Summary Judgment. (A98-A99, A100-A119.)

On or about February 6, 2001, the trial court denied their Motion for Summary Judgment essentially determining that Petitioners owed a duty to provide a warning adequate to inform foreseeable users that diving into a shallow pool

created the specific risk of quadriplegia and that a triable issue of fact existed as to whether the defendant discharged that specific duty. (A122-A123.) On May 11, 2001, Petitioners filed a Motion for Dismissal of Complaint arguing Respondent's complaint was due to be dismissed as it was filed in direct opposition to the terms of her settlement with McMasker as recited in the trial court's Order of February 2, 1999. (A124-A158.) The terms of the settlement agreement specifically stated:

> Leesa Bunch, through counsel, covenants today not to sue or settle with Doughboy Enterprises. Appellantin (sic) Industry, or Golden West Marketing, as those will be the targets of a cross-complaint by McMasker and Waterworks, and that we (McMasker) will attempt to join in this action to prosecute those cross-complaints with the now pending action.

(A142-A143.) On July 16, 2001, the trial court denied Petitioners' Motion for Dismissal of Complaint. (A168.)

On July 30, 2001, a jury was struck and the trial began. (A200-A202.) The trial concluded on August 22, 2001. (A169-A170.) On August 23, 2001, following a 10 to 2 verdict in favor of Respondent, a tragically sympathetic teenage quadriplegic, the trial court rendered judgment for Respondent against Petitioners in the amount of $12,526,890.70 plus costs and for McMasker for $1,000,000.00 plus costs. (A171-A172.) On or about September 6, 2001, Petitioners filed their Notice of Intention to Move for New Trial. (A173-A175.) On September 14, 2001, Petitioners filed their Points and Authorities in

Support of Motion for New Trial arguing there was insufficient evidence to justify the verdict, citing several errors of law committed by the trial court, and asking the court to reweigh the evidence, draw reasonable inferences therefrom, and conclude that the court and jury should have found there was no defect in Petitioners pool. (A178-A191.)

On September 20, 2001, Petitioner Hoffinger Industries, Inc. filed a Notice of Bankruptcy with the trial court. (A192-A193.) On October 19, 2001, a hearing was held before the trial court with regard to the Motion for New Trial. (A194-A195.) Because the trial court was reluctant to make a ruling on the motion due to the pending bankruptcy proceedings, the motion for new trial was never decided, and the trial court dropped all matters relating to the case from the calendar. (A194-A195.)

B. *Procedural History*

On May 11, 2001, Petitioners filed a Motion for Dismissal of Complaint arguing Respondent's complaint was due to be dismissed as it was filed in direct opposition to the terms of her settlement with McMasker as recited in the trial court's Order of February 2, 1999. (A124-A158.) On July 16, 2001, the trial court denied Petitioners' Motion for Dismissal of Complaint. (A168.)

On July 30, 2001, a jury was struck and the trial began. (A200-A202.) The trial concluded on August 22, 2001. (A169-A170.) On August 23, 2001, following a 10 to 2 verdict in favor of Respondent, the trial court rendered judgment for Respondent against Petitioners in the amount of $12,526,890.70 plus costs and for McMasker for $1,000,000.00 plus costs. (A171-A172.)

On October 19, 2001, Petitioners filed a Notice of Appeal with the trial court. (A196-A197.) Petitioners subsequently filed a Substitution of Attorney and Notice of

Appeal with the California Court of Appeal. (A198-A199.) Petitioners' filed their initial appeal brief in the California Court of Appeal on February 13, 2003. The California Court of Appeal denied Petitioners' appeal on November 8, 2004; Petitioners motion for rehearing was denied by that same Court on December 7, 2004. Petitioners then filed a petition for review with the California Supreme Court, which was denied by a vote of 4-3 on February 16, 2005. This appeal follows within 90 days following the denial of the petition for certiorari to the California State Supreme Court.

ARGUMENT AND CITATION OF AUTHORITY

A. *The State Courts Below Violated Petitioners' Federally Protected Right to Due Process of Law When They Allowed Trial to Proceed But Refused to Allow Evidence of McMasker's Default.*

Following her accident, Respondent sued, among others, McMasker, the distributor of the pool liner manufactured by Petitioners, for $20 million. (A53-A54, A55-A56, A85-A88.) McMasker, however, did not timely answer Respondent's complaint and Respondent secured a default judgment against McMasker. (A69-A71.) This default judgment effectively prevented McMasker from arguing all aspects of liability including comparative negligence and assumption of risk arguments. Because the default judgment essentially imposed liability on McMasker, McMasker was left to attempt to mitigate its damages.

To avoid a $20 million verdict levied against them, McMasker tendered its policy limits of $1 million dollars. (A139-A177.) However, despite this settlement, McMasker remained in this litigation as a defacto Respondent pursuing Petitioners for indemnification. (A139-A177.) While the jury was told of the settlement agreement between Respondent and McMasker, the jury was not informed of the

reason for the settlement — the default judgment and the irrefutable liability that it imposed. (A251-A260.)

Proceeding to trial, McMasker, although technically a co-defendant, prosecuted its claim against Petitioners while wearing the white hat of settlement – thereby buttressing Respondent's claims. Throughout trial, McMasker characterized themselves as looking out for the best interests of not only Respondent but the entire population of children of California while accusing Petitioners of callously refusing to participate in settlement discussions and shifting liability in this tragic accident to the home-owners who ignored explicit directions regarding the proper assembly of the above ground pool and warning labels and an eleven year old girl who dove head-first into shallow water despite being warned by numerous people and labels placed on the pool and embossed on the rails and ladder not to do so. (A251-A260.)

While the trial court allowed McMasker to present evidence regarding the motivations of Petitioner in defending this matter, the trial court refused to allow Petitioners to introduce evidence regarding McMasker's motivations for settling and prosecuting this claim. (A244-A251) The trial court prevented Petitioner from introducing evidence of the default judgment or cross-examining any of McMasker's representatives on the motivations behind its settlement. (A251-A264.) Because the default judgment precluded McMasker from arguing liability, its settlement was not made to protect California children but to protect its own bottom line. This evidence was crucial to Petitioners' defense, speaks directly to the credibility of McMasker and its witnesses, and would be relevant in the eyes of a jury.

The trial court's exclusion of the default judgment is a violation of due process considerations afforded by the United States Constitutions because "due process requires that there be an opportunity to present every available

defense...." *Amer. Surety Co. v. Baldwin* 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231 (1932). *See also States of Kansas v. Occidential Life Ins. Co.*, 95 F.2d 935 (10th Cir. 1938). Not only does due process mandate the opportunity to present every available defense, it also mandates the opportunity to present pertinent facts in defense. *See Bandini Petroleum Co. v. Superior Ct. of State of Cal. in and for Los Angeles County*, 284 U.S. 8, 19, 52 S.Ct. 103, 76 L.Ed. 136 (1931). It is central to the idea of due process that parties have the opportunity to "present evidence on the crucial facts" and "be heard on the *critical and decisive allegations* which go to the *core* of the parties' claims or defense." *Bankers Trust Co. v. Bethlehem Steel Corp.* 752 F.2d 874 (3rd Cir. 1984) (emphasis in original).

Petitioners submit the default judgment entered against Respondent McMasker and the fact that its face amount far exceeded the reduced policy limits settlement was of critical import to the jury's determination of the viability of both Respondent McMasker's indemnity claim and Petitioners' defenses to the entire claim. By precluding McMasker from challenging its own liability, the default judgment changed its perspective and trial strategy. Instead of arguing the comparative negligence of Respondent Bunch who knowingly dove head first into shallow water, McMasker argued that Petitioners were liable because their should have had a more explicit warning label, for the sole purpose of recovering its own settlement money. (A251-A260.) This allowed McMasker to present itself as a "good guy" who owned up to its responsibilities while portraying Petitioners as callous indifferent corporations unconcerned with the safety of their product and denied Petitioners the opportunity to fully defend themselves and present to the jury evidence of alternative reasons for McMasker's eagerness to settle including McMasker's failure to meet court imposed deadlines and the consequences of a $20 million default.

Not only did the denial of admission of evidence of McMasker's default deny Petitioners their constitutionally protected right to present evidence crucial to all their defenses, it denied Petitioners their constitutionally protected right to cross-examine witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed.2d. 287 (1970). "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." *Interstate Commerce Commission v. Louisville & N.R. Co.*, 227 U.S. 88, 93, 33 S.Ct. 185, 57 L.Ed. 431 (1913).

While Petitioners were technically given the opportunity to cross-examine McMasker's witnesses, they were effectively denied the opportunity because they were denied the opportunity to cross-examine McMasker's witnesses regarding the default judgment and McMasker's assertions as to its reasons for settlement. Petitioners were also deprived of their due process right to confront witnesses as to bias and prejudice. *See Ellis v. Capps* 500 F.2d 225, 227, (5th Cir. 1974). At the very least, once Respondent McMasker pryed open the Pandora's box of issues related to the payment of the judgment, Petitioners should have been allowed to present evidence to unmask Respondent McMasker's righteous arguments that it paid the policy limits as a gesture of penitence, preserving its right to seek reimbursement from the true culprits – Petitioners.

Instead of allowing the jury to decide the credibility of Respondent McMasker's self-serving penitence argument, the trial court allowed Respondent McMasker to leave the jury with a mistaken impression about its motives that the trial court then prohibited Petitioners from correcting. The refusal to allow introduction of evidence as to Respondent McMasker's true motives deprived Petitioners of their

constitutional due process right to present evidence in their defense and as to the credibility and bias of McMasker's witnesses. In so doing, the courts of California have effectively undertaken to repeal the Fourteenth Amendment in favor of a results-oriented, self-appointed champion of the injured trial by ambush system. This Honorable Court should review this matter and, consistent with 28 U.S.C. § 1257, grant review in order to redress the violation of Respondents "title, right, privilege" to due process of law "claimed under the Constitution" of the United States

B. *The State Courts Below Violated Petitioners' Federally Protected Right to Due Process of Law When They Refused to Enforce Respondent's Court-Approved Covenant Not to Sue Petitioners.*

Upon settlement with Respondent McMasker, Respondent Bunch signed a court approved settlement agreement which on its face prohibited any claim against Petitioners. (A139-A177, A168.) The record is silent as to any fraud or duress surrounding the agreement to these terms. Accordingly, the terms of the settlement should have been given their full effect; Petitioners' Motion for Dismissal of Complaint filed prior to trial based on the agreement was incorrectly denied by the trial court. (A139-A177, A168.)

The trial court erroneously permitted this matter to proceed to trial and jury despite Respondent's prior, court-sanctioned, covenant not to sue Petitioners. (A168.) Respondent settled her claims against McMasker and executed the settlement through a court-conducted settlement hearing (A139-A177.) Upon the transcribed settlement hearing, the record shows Respondent Bunch specifically, and as part of the submission made to the court to secure approval of the settlement, recited and agreed as follows:

> Leesa Bunch, through counsel, covenants today not to sue or settle with Doughboy Enterprises. Appellantin (sic) Industry, or Golden West Marketing, as those will be the targets of a cross-complaint by McMasker and Waterworks, and that we (McMasker) will attempt to join in this action to prosecute those cross-complaints with the now pending action.

(A142-A143.) McMasker filed the anticipated Cross-Complaint for Implied Indemnity, Comparative Indemnity, Equitable Distribution, and Declaratory Relief against Petitioners. (A77-A78.)

Despite the terms of the court-sanctioned settlement agreement, and some six months after McMasker filed the claims anticipated in the settlement hearing, Respondent, contrary to the terms of the court-ordered settlement, amended her complaint to name Petitioners as defendants. (A85-A86.) Upon discovery of the referenced settlement hearing and the material representations to the trial court therein, Petitioners filed a motion to dismiss. (A124-A158.) On July 16, 2001, the court denied the motion and purported to vacate its prior approval of the settlement. (A168.)

Petitioners submit they are third party beneficiaries to the court-sanctioned settlement and, as such, had a property interest in the agreement.

> To have a property interest...a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.... Property

> interests, of course, are not created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701 (1972). *Cf. Organized Fisherman of Florida v. Hodel*, 775 F.2d 1544, 1548-1549 (11th Cir. 1985). Petitioners submit that they had a legitimate claim of entitlement to not be sued by Respondent Bunch under the court-approved settlement agreement.

Under California law, third party beneficiaries, such as Petitioners, have the right and expectation to enforce the contract. Cal. Civ. Code § 1559. Additionally, third party beneficiaries have standing to assert their rights under the contract and Petitioners' properly asserted those rights by motion to the trial court. *See Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 558 (third party beneficiary has standing to enforce rights under settlement agreement). The *Brinton* Court emphasized that the intention of the parties at the time the contract was entered controls in terms of such third party rights. *Id.* at 559 (citing Cal. Civ. Code § 1636).

In the case *sub judice*, Petitioners submit that even if the intention of the parties is to be ascertained from outside the contract document, the hearing transcript from the settlement hearing establishes the clear intention that Petitioners would suffer suit only through the indemnification action filed by McMasker. (A139-A177.) In considering later-contrived evidence from Respondent McMasker, the trial court violated the law with respect to the

proper evidence, if any, to consider other than the settlement document itself.

Because Petitioners were third-party beneficiaries, Petitioners' rights restricted the Respondents' ability thereafter to reform the covenant. Petitioners' rights eliminated the contracting parties' rights to purportedly reform the agreement without the consent of Petitioners (which, of course, was never given). The prevailing rule is that after a third-party beneficiary accepts or adopts the contact entered into for his benefit, the parties thereto cannot rescind or modify it without his consent so as to affect or deprive him of his rights thereunder in the absence of a reservation of the right of rescission or modification in the contract. 17A Am. Jur. 2d, Contracts § 462, p. 484; *see also*, Annotation: *Mutual Rescission or Release of Contract as Affecting Rights of Third-Party Beneficiary,* 97 A.L.R.2d 1262, 1264 where it is stated:

> The general common-law rule as announced by the courts is that the parties to a third-party beneficiary contract can rescind it at any time before the third-party beneficiary accepts, adopts, or acts upon the contract, but where a third-party beneficiary contract has been accepted or acted upon by the third-party, it cannot be rescinded by the principal parties without the third party's consent.

As Petitioners were third party beneficiaries who accepted the contract by incorporating it as a defense to the suit by Respondent Bunch, Respondents could not rescind the contract without Petitioners' express permission. The court also could not rescind a valid court-approved settlement agreement without agreement of all parties. By doing so and subjecting Petitioners to trial, the trial court

violated Petitioners constitutional right against deprivation of its property right in the settlement agreement.

CONCLUSION

For all the foregoing reasons, and because of the cumulative effect of the errors, Petitioners respectfully request this Court grant certiorari and review and redress the deprivation of Petitioners' right to due process of law.

Respectfully Submitted,
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IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF THE
COUNTY OF GLENN

[DATE STAMP]

LEESA BUNCH,
Plaintiff,

Case No. 30534

Vs.

HOFFINGER INDUSTRIES, INC., dba
DOUGHBOY RECREATIONAL COMPANY,
And GOLDEN WEST MARKETING, INC.,
Defendants.

JUDGMENT

_____)
McMASKER ENTERPRISES, INC., dba
WATERWORKS UNLIMITED,
Cross-complainant,

Vs.

HOFFINGER INDUSTRIES, INC., dba
DOUGHBOY RECREATIONAL COMPANY,
And GOLDEN WEST MARKETING, INC.,
Cross-defendants.
_____)

A special verdict having been rendered by the jury in the above entitled matter, the court having reserved preparation of the judgment upon such special verdict, and the parties having been heard on the terms of the judgment to be entered on such special verdict,

IT IS HEREBY ORDERED AND ADJUDGED that

Plaintiff LEESA BUNCH shall have judgment against the defendants HOFFINGER INDUSTRIES, INC., dba DOUGHBOY RECREATIONAL COMPANY, and GOLDEN WEST MARKETING, INC., in the amount of $12,526,890.70 plus costs in the amount of $_____.

Cross-complainant McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED, shall have judgment against the defendants HOFFINGER INDUSTRIES, INC., dba DOUGHBOY RECREATIONAL COMPANY, and GOLDEN WEST MARKETING, INC., in the amount of $1,000,000.00 plus costs in the amount of $_____.

Dated: Aug 23, 2001

/s/_____
Judge of the Superior Court

Filed 11/8/04

CERTIFIED FOR PARTIAL PUBLICATION*

COPY

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Glenn)

LEESA BUNCH, a Minor, etc.,
Plaintiff and Respondent,

v.

C040177
(Super. Ct. No. 30534)

HOFFINGER INDUSTRIES, INC., et al.,
Defendants, Cross-Defendants
and Appellants;
McMASKER ENTERPRISES, INC.,
Cross-Complainant and Respondent.

APPEAL from a judgment of the Superior Court of Glenn County, Joseph B. Harvey, J. Affirmed.

Finley and Buckley, Timothy J. Buckley III, Chad D. Graddy, Dennis A. Brown III; Foley & Lardner and Robert J. Wenbourne for Defendants, Cross-Defendants and Appellants.

James A. Henderson, Jr., and Aaron D. Twerksi for amicus curiae Aqua Magazine on behalf of Defendants, Cross-Defendants and Appellants.

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*Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts IV, V, and VI of the Discussion.

Jay-Allen Eisen Law Corporation, Jay-Allen Eisen, C. Athena Roussos; Charter Miller Davis and Whitney Davis for Plaintiff and Respondent.

Jeffrey G. Nevin Law Corporation and Jeffrey G. Nevin for Cross-Complainant and Respondent.

One hot summer day, 11-year-old Leesa Bunch (Bunch) dove into a four-foot deep, aboveground swimming pool and changed her life forever. Rendered quadriplegic by the dive, Bunch eventually filed suit against, among others, defendants Hoffinger Industries, Inc., doing business as Doughboy Recreational Company, and Golden West Marketing, Inc. (collectively Hoffinger). Hoffinger manufactured the replacement pool liner used in the pool. Bunch also sued cross-complainant McMasker Enterprises, Inc. (McMasker), the seller of the liner. McMasker eventually settled with Bunch.

Bunch's complaint alleged negligence, products liability, failure to warn, and breach of warranty. A jury awarded Bunch over $12 million and awarded McMasker $1 million on its indemnity claim. Hoffinger appeals, contending: (1) it owed no duty to warn of possible injury from the obvious danger of diving into a shallow aboveground pool, (2) the court misapplied the doctrine of primary assumption of risk, (3) Hoffinger's acts or omissions were not the proximate cause of Bunch's injury, (4) the court erred in admitting evidence of prior accidents involving Hoffinger pools, (5) the trial court erred in failing to bifurcate the liability and damage phases of the trial, and (6) the court violated Hoffinger's due process rights in refusing to admit evidence of McMasker's default judgment and refusing to enforce Bunch's covenant not to sue. Finding no error, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Preliminaries

Bunch suffered her catastrophic injuries in August 1993. She filed suit against various corporate entities, including McMasker, alleging negligence, strict products liability manufacturing defect, strict products liability design defect, failure to warn, and breach of warranty, and requesting punitive damages. McMasker failed to respond, and in August 1998 the court granted Bunch's request for a default judgment against McMasker in the amount of $20,001,157.

After Bunch informed McMasker's insurer of the default judgment, McMasker brought a motion for relief from the default judgment. Subsequently, McMasker abandoned the motion and pursued settlement negotiations with Bunch.

McMasker tendered both the defense and indemnity of the action to Hoffinger; Hoffinger declined to participate. Hoffinger also opted out of McMasker's settlement negotiations with Bunch. McMasker filed a cross-complaint for indemnification against Hoffinger.

During settlement negotiations, Bunch agreed to set aside the McMasker default judgment and settle her claim against the company for $1 million, the limit of McMasker's insurance policy. Bunch also agreed not to sue Hoffinger, the target of McMasker's indemnity cross-complaint.

After settling with McMasker, Bunch requested that McMasker waive her agreement not to sue Hoffinger. McMasker agreed to waive the agreement not to sue.

Accordingly, Bunch amended her complaint to substitute Hoffinger as Doe defendants.

Motion for Summary Judgment

Hoffinger filed a motion for summary judgment. Prior to trial, the court heard oral argument on the motion. The court found the central issue to be the adequacy of the warning provided by Hoffinger with its pool liners. The court queried whether the danger of diving into an aboveground swimming pool was obvious to an 11-year-old child. The court further questioned whether Hoffinger discharged its duty to warn by placing warning labels in the pool liner package with instructions for the consumer to affix them to the sides of the installed liner. Finding these issues raised questions of fact, the court denied Hoffinger's summary judgment motion.

Pretrial Motions

Hoffinger also filed a motion to dismiss Bunch's complaint, arguing the complaint was filed in direct opposition to the terms of her settlement with McMasker. The court denied the motion.

Hoffinger moved to bifurcate the trial, separating the liability and damage determinations. The court denied the motion, noting multiple witnesses would be testifying regarding both aspects of the trial, resulting in the same evidence being presented twice.

The Trial

A 17-day jury trial followed. The jury heard testimony about Bunch's fateful dive and Hoffinger's

warning labels, and heard expert testimony regarding the efficacy of warning labels on the minds of children.

The Accident

Bunch's brother Erick rescued his sister from the bottom of the pool following her dive. According to Erick, who was nine years old at the time, he saw no warning labels on the pool. Loretta Frank, the owner of the pool, had told them not to dive on a previous visit. She did not tell them why they should not dive and did not repeat the warning the day of the accident.

Another child, Tyler Breeding, dove into the pool. Breeding performed a shallow dive, diving straight out into the water. He dove from the bench located on the deck adjacent to the pool.

Bunch also dove at least once before the dive that led to the accident. Erick did not see Bunch's final dive, but he heard the splash and saw her curled up and floating in the middle of the pool. Bunch whispered she could not breathe, and Erick dragged her to the edge of the pool.

Loretta Frank testified about the pool and the accident. Sometime between 1988 and 1990, she and her husband, Joe Frank, received a used frame for an aboveground swimming pool as a gift. The pool frame measured 33 feet long, 18 feet wide, and four feet high. Since the vinyl pool liner had rotted, the Franks purchased a new one from McMasker, a swimming pool supplier doing business as Waterworks. Hoffinger manufactured the liner.

Mr. Frank erected the frame and installed the replacement liner. He recessed the pool about two feet into the ground. Mr. Frank built an adjacent deck at the level of

the top of the pool frame and built wooden benches on the deck next to the pool.

Mrs. Frank testified the Hoffinger liner came with labels cautioning against diving. She described the label as three-quarters of an inch wide and five and one-quarter inches long, stating: "'[C] aution [–]I no diving [–] shallow water.'" She testified the labels were "most likely" on the pool the day of the accident.

At the Franks' pool the rule was "no diving." Although Mrs. Frank testified she never saw anyone jump into their pool, she acknowledged children probably jumped from the deck into the pool when her back was turned.

The day of the accident, Mrs. Frank testified she took Bunch and Erick by the hand and led them to the side of the pool. She told them: "This is a shallow pool, it is only four feet deep, no diving." Mrs. Frank did not mention the possibility of injury, nor did she warn Bunch she risked neck injury if she dove into the pool.

Just prior to the accident, the children were not in the pool. Mrs. Frank went into the house prior to Bunch's dive.

Mr. Frank testified he found his check register containing a notation for a check for the purchase of the replacement liner dated April 1988. When he purchased the liner from Waterworks, the box the liner came in had been previously opened. He was sure he got what he paid for, and testified the box showed no signs of being tampered with and the contents appeared to be intact.

Mr. Frank could not recall if the package contained any warning labels. Mr. Frank was certain he never saw a warning that cautioned against diving and warned about neck

injuries. Had Hoffinger provided such a warning, he would have put it on the liner. If the warnings cautioned against putting a deck near the pool, Mr. Frank would not have placed the bench next to the pool.

Tyler Breeding, the other swimmer the day of the accident, also testified. According to Breeding, the Franks had a rule at their pool of no diving or jumping. Mrs. Frank told them "'no diving.'" Breeding testified the Franks' pool had 15 to 20 warning labels circling the top of the pool. Breeding later retracted the statement concerning the labels.

Breeding stated he did not dive the day of the accident. Bunch dove twice. After the first dive, Mrs. Frank told Bunch not to dive or she could not continue to swim. Then Mrs. Frank walked into the house.

Out of the corner of his eye, while he was on the bench tying his shoe, Breeding saw Bunch dive again. Bunch made a sharp vertical dive; she did not make a shallow dive.

Bunch testified about the day of the accident. She stated she vaguely remembered stickers on the pool liner that day. The stickers said: "'No diving in shallow water'" and showed a man making a "pike," or vertical, dive with the word "'caution.'" Bunch believed the label warned her "[n]ot to dive like that."

Bunch had no memory of Mrs. Frank standing by the side of the pool, talking about the pool's depth and warning both her and Erick not to dive into the pool. Bunch did remember Mrs. Frank telling her not to dive on occasion. The day of the accident, Mrs. Frank said "be careful and don't dive."

Despite the warning, both Bunch and Breeding made shallow dives into the pool. The Franks allowed children to jump into the pool. According to Bunch: "Well, the sign [by the pool] said not to jump but she let us, so I figured she was just being a mom, and mom's [sic] say no all the time, so."

Bunch had watched the summer Olympics the previous year and tried to imitate the shallow racing dives of the Olympic swimmers. At other pools she practiced the shallow racing dive, diving far out and trying to go less than a foot into the water. Because she believed she dove well, Bunch never worried about diving too deeply.

On the day of the accident, after Mrs. Frank went into the house, Breeding and Bunch dove a few times from the deck into the pool. Bunch made flat racing dives.

Bunch then dove from the bench, trying to make a flat racing dive.[1] Bunch remembers little of the aftermath of the dive. After she hit the water her neck "felt like it hit my funny bone," and she had trouble breathing.[2]

Bunch testified she was completely unaware of the danger of diving into a shallow pool. A warning pointing out the risk of severe injury would have prevented her from making the dive.

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[1]Hoffinger claims: "[Bunch] dragged a bench – not manufactured by [Hoffinger] – to the edge of the pool deck (also not manufactured by [Hoffinger]), climbed up and hurled herself head first with her hands by her sides into the shallow, above-ground pool." The trial transcript does not support Hoffinger's characterization of events.

[2]The accident dislocated Bunch's cervical spine, crushing her spinal cord. She was instantly completely paralyzed below the neck. She breathes only with the aid of a diaphragm pacemaker and a ventilator.

The pool liner itself was never admitted into evidence. As noted, Erick Bunch, Mrs. Frank, Mr. Frank, Tyler Breeding, and Bunch all provided conflicting testimony as to the existence and substance of any warning labels visible the day of the accident.

Bunch's Experts

Bunch presented testimony by Ross Buck, Ph.D., a professor of communication sciences and psychology at the University of Connecticut. According to Buck, effective warnings "act as brakes to stop dangerous behaviors." Buck outlined the components of an effective persuasive warning: it must command attention, galvanize memory, evoke emotion, contain an explicit instruction, and show a consequence. This kind of warning is especially important for children under the age of 12.

Buck also discussed pool culture and the behavior of children vis-a-vis swimming pools. According to Buck, the ethos of backyard swimming pools includes letting kids have fun. The pool and the surrounding atmosphere encourage rambunctious, rowdy behavior by children.

In addition, children are motivated to try new things. Eleven year olds think in concrete terms. These two factors, the urge to experiment and concrete thought processes, render the dangers of diving into a shallow pool not readily apparent to an 11-year-old child. Buck testified a young diver standing at the edge of an aboveground pool cannot necessarily judge the depth of the pool.

Buck discussed the standards for warning labels developed by the American National Standards Institute (ANSI). ANSI provides guidelines to manufacturers; these guidelines are not mandatory.

Buck also noted that from 1963 through 1971 various aboveground pool manufacturers ran ads showing children diving from both pool side and diving boards into aboveground pools. However, in 1977 Sears began putting labels on its pools stating: "'[D] anger [–] no diving [–] shallow water.'" The label was accompanied by a picture of a diver with a slash through it and the words: "'Diving can cause paralysis.'"In 1983 Hoffinger began to use a warning label that said, in effect, "you could break your neck."

Buck also studied the claims history of Coleco, the swimming pool company Hoffinger bought in 1985. For the 10 years prior to instituting the paralysis warning, Coleco's claims records revealed between two and 10 claims per year for spinal cord injuries resulting from diving into Coleco pools. For the three years after Coleco employed the paralysis warning labels up until Hoffinger bought Coleco, there were no claims for spinal cord injuries.

In Buck's opinion, the labels that accompanied pool liners of the same vintage as the Franks' pool liner were neither adequate nor effective. The labels did not meet the minimum requirements for size under ANSI standards; the letters were too small. Most importantly, the labels failed to spell out any consequences of diving into shallow water.

Buck summarized his opinion of Bunch's accident: "...I conclude that Leesa's accident was caused by the pool. How can an inanimate object cause something? This is a pool, something that people have to act on in order for it to have any effect at all. [¶] But all the gas pedals were there; the expectations encouraging diving and discouraging strict rules; the playful, rowdy behavior pulled out of the kids by the pool environment; the dangerous shallowness of the pool not readily apparent to the diver. The effective brakes were not there; the eye-catching memorable, emotionally

evocative, explicit warnings... that effectively communicate consequences."

Ralph Johnson, a professor and Ph.D. in sports administration, testified concerning the efficacy of warnings on children. Johnson described an effective warning as consisting of three parts: (1) an "attention getter," for example, "danger"; (2) a rule, such as "no diving"; and (3) the most important component, a consequence, such as "serious or fatal injury."

According to Johnson, it was both possible and feasible to put warnings on the liners at the factory instead of trusting the consumer to apply them after the liner was installed. Johnson described several methods of applying the warnings. In the alternative, Johnson stated manufacturers could take steps to insure consumers applied the warnings after set-up.

Johnson testified that many people who dive into aboveground pools are unable to gauge the depth of the pool. Johnson stated the risk of severe, permanent spinal injury was not readily apparent to an 11 year old. His review of the facts of the accident led Johnson to believe Bunch was attempting a shallow racing dive and had no idea of the possible consequences of the dive.

Johnson stated diving causes the majority of quadriplegic accidents. However, the pool industry has been reluctant to warn users of the risk and has been slow to employ warning labels. Current pool industry standards require manufacturers, not consumers, to prominently display on their pools tamperproof warnings against diving.

Cargile's Testimony

Danny Cargile, Hoffinger's corporate customer relations and quality control manager, testified extensively regarding pool liners and warning labels. Cargile had worked for Hoffinger for 30 years. Cargile stated he was the most knowledgeable person at Hoffinger about warnings design, prior accidents, and the liner involved in this case.

During Bunch's case-in-chief, Cargile testified it was not feasible to put permanent warnings on the pool liner before it left the factory. Cargile admitted he saw no warning decals on the Franks' liner and acknowledged the system of delegating the attachment of the decals to the consumer "failed."

Cargile stated diving was a misuse of the pool but also acknowledged children diving presented a foreseeable misuse. Cargile admitted children are the ordinary users of Hoffinger's pools. Cargile also acknowledged Hoffinger knew children occasionally misused its pools by diving and that a liner is unsafe without warnings that children can readily understand. He admitted warnings work: they prevent crippling injuries resulting from diving into aboveground pools.

Cargile testified that Hoffinger's practice of delegating the duty to affix the warning to the consumer was proper. He stated an informal survey of pool owners revealed 95 percent installed the warning decals. However, Cargile could provide no records of the study or of any research by Hoffinger on warnings. Hoffinger routinely destroyed all such records.

Cargile testified it was not feasible to print warnings on pool liners. However, Cargile later admitted Hoffinger manufactures pool liners with preprinted designs for its Lomart pool division. Cargile stated Hoffinger conducted

research and development projects but could not find a feasible way to print warnings on the liners. Cargile conceded Hoffinger never consulted any expert or anyone else outside the company to examine the feasibility of preprinted liners.

Cargile presented several reasons why preprinted warnings would not work. He stated the different models and styles of frames prevented positioning of the warnings so they could be read. However, Johnson testified this problem could be overcome by printing the warning on several repeating bands, visible regardless of how the liner was hung.

Cargile also testified that preprinted warnings would become distorted by the stretching of the liner. Since several companies manufacture the aboveground pool frames, it is impossible to know in advance how much the liner might stretch. However, on cross-examination, Cargile's deposition testimony revealed Hoffinger's replacement liners do not stretch. The Franks' pool liner was a replacement liner that did not stretch.

Initially, during discovery, Cargile stated there had been only one prior case of a diver's becoming quadriplegic from diving into a Hoffinger pool. At trial, Cargile estimated there had been 10 such incidents. Documents produced by Hoffinger revealed there had been 47 incidents between 1977 and 1994. Although Cargile stated he was the Hoffinger employee most knowledgeable about prior claims, he was unaware of the Hoffinger document listing 47 quadriplegic claims.

The vintage of the Franks' liner became an issue during Cargile's testimony. In August 1988 Hoffinger began adding a warning in its replacement liner instruction manual

against building decks or placing furniture near a pool. Hoffinger did not include such a warning in liners made prior to August 1988.

Cargile testified the Franks must have received the deck and furniture warning because the serial number of their liner ended with the letter "O." The "O" denoted a liner manufactured after August 1988, so the Franks must have purchased the liner around April 1989. Cargile could produce no documentation to corroborate his explanation of the Hoffinger serial numbers.

However, as stated *ante*, Mr. Frank located his check register just prior to trial. The check register contained an entry for the check he had written to Waterworks for the liner in April 1988. In light of the date of purchase, it appears the liner instruction manual did not contain the caution against placing decks and furniture next to the pool.

The Verdict and the Aftermath

The court instructed the jury on both design defect and failure to warn products liability theories. The jury returned a verdict in Bunch's favor. The jury answered in the affirmative the question: "Was there a defect in design or a failure to warn defect in the Doughboy Pool product, which includes the liner and the accompanying materials, as to the defendant Hoffinger...?" The jury also found the defect caused the injury and that the injury was reasonably foreseeable.

The jury awarded $16,112,306, an amount reduced by Bunch's comparative fault (5 percent) and the comparative fault of other nondefendants (20 percent). The trial court awarded Bunch $12,526,890.70 plus costs and awarded McMasker $1 million plus costs.

Hoffinger moved for a new trial. However, shortly thereafter, Hoffinger filed a notice of bankruptcy with the trial court. The trial court dropped the hearing on the motion for a new trial from the court's calendar. Hoffinger filed a timely notice of appeal.[3]

DISCUSSION

I. Open and Obvious Danger

Hoffinger contends the trial court erred in failing to enter a directed verdict in its favor since Hoffinger owed Bunch no duty to warn her of possible head injury from the open and obvious danger of diving headfirst into a shallow aboveground pool. According to Hoffinger, "Although no California court has ever considered the specific question of whether a pool or pool component manufacturer has the duty to warn a user of the dangers associated with diving head first into a shallow, above-ground pool, the jurisdictions that have considered these issues have consistently decided, citing policy reasons similar to those embraced by California in other contexts, that because an above-ground swimming pool is a simple product, the manufacturer is under no duty to warn of any dangerous conditions or characteristics that are readily apparent or visible upon casual inspection as reasonably expected to be recognized by the average user of ordinary intelligence."

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[3]We grant the parties' five requests for judicial notice filed February 15, 2002; March 1, 2002; March 6, 2002; February 6, 2003; and February 13, 2003, relating to proceedings in Bankruptcy Court. We deny Bunch's motion to dismiss Hoffinger's appeal. Bunch argued Hoffinger failed to seek relief from the bankruptcy stay before filing the notice of appeal in this court. On February 8, 2002, the United States Bankruptcy Court granted Hoffinger's motion to retroactively annul the bankruptcy stay, effectively rendering Bunch's argument moot.

The trial court may grant a motion for directed verdict "'only when there is no substantial conflict in the evidence. In ruling on the motion, the court does not consider credibility of witnesses but gives to the evidence of the party against whom it is directed all its legal value, indulges every legitimate inference from such evidence in favor of that party, and disregards conflicting evidence.' [Citation.] The same test applies to the appellate court." (*Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 758, italics omitted.)

Cases Finding an Obvious Danger

In support, Hoffinger cites an impressive number of decisions, most notably *Glittenberg v. Doughboy Recreational Industries* (Mich. 1992) 491 N.W.2d 208 (*Glittenberg*). In *Glittenberg*, three adult plaintiffs sued pool manufacturers after sustaining head injuries and becoming paralyzed while attempting shallow dives into aboveground pools. Each plaintiff acknowledged that he knew the depth of the water in the pool and was aware that a deep dive into shallow water was dangerous. (*Id.* at p. 210.) On appeal, a sharply divided court held four to three that plaintiffs could not recover for their injuries since pool manufacturers had no duty to warn of the danger of diving into an aboveground pool because the danger was open and obvious. (*Id.* at p. 213.)

The dissent in *Glittenberg* noted there was substantial evidence that the risk was not open and obvious. Expert testimony established a basic lack of public awareness of the great risk of spinal injury when diving. Even experienced divers failed to understand the potential for serious injury when diving into a shallow pool. (*Glittenberg, supra*, 491 N.W.2d at pp. 224-225 (dis. opn. of Levin, J.).)

The dissent also faulted the majority for failing to acknowledge the significance of the plaintiffs' attempts to execute "flat," as opposed to deep, dives. The majority opined that plaintiffs attempted flat dives because they were aware of the danger and were attempting to avoid hitting bottom. However, the dissent noted the attempt at shallow dives revealed "that divers incorrectly perceive that execution of a shallow dive is sufficient protection from the danger presented by diving in a shallow aboveground swimming pool." (*Glittenberg, supra,* 491 N.W.2d at p. 225 (dis. opn. of Levin, J.).)

As Hoffinger observes, many courts adopt *Glittenberg's* reasoning that "[t]he obvious risk of this simple product is the danger of hitting the bottom. When such a risk is objectively determinable, warnings that parse the risk are not required. The general danger encompasses the risk of the specific injury sustained. In other words, the risk of hitting the bottom encompasses the risk of catastrophic injury." (*Glittenberg, supra,* 491 N.W.2d at pp. 217-218.)

In *Neff v. Coleco Industries, Inc.* (D.Kan. 1991) 760 F.Supp. 864 (*Neff*), the 25-year-old diver admitted a familiarity with the aboveground pool and knowledge of the pool's depth. (*Id.* at p. 866.) The plaintiff made several dives before diving and hitting the bottom, rendering him a quadriplegic. (*Ibid.*) However, the plaintiff stated he was unaware of the risks associated with diving headfirst into shallow water, including the risk of spinal cord injury. (*Ibid.*)

The district court found the defendant pool manufacturer entitled to judgment as a matter of law. The court concluded: "The potential consequences of diving head first into water of that depth [four feet] should be readily apparent to a reasonable man. We believe that the risk of propelling a six foot, two inch frame head first into shallow

water is patent, open and obvious and should be readily apparent to a reasonable user of the swimming pool. Consequently, we conclude that defendant owed plaintiff no duty to warn him of the open and obvious risk of diving head first into the shallow swimming pool." (*Neff, supra*, 760 F.Supp. at p. 868; see also *Griebler v. Doughboy Recreational, Inc.* (Wis. 1991) 466 N.W.2d 897, 898 [diving into shallow water of unknown depth is an open and obvious danger requiring no warnings].)

A 15-year-old experienced swimmer, aware of the potential danger, dove off a sliding board platform into a five-foot-deep, below-ground swimming pool in *Benjamin v. Deffet Rentals, Inc.* (Ohio Ct.App. 1981) 419 N.E.2d 883. The Ohio Supreme Court granted summary judgment in favor of the pool owner and board manufacturer, finding the plaintiff aware of the potential risks. The court quoted earlier case law, stating: "'While a child is required to exercise for his own safety only such care as children of like age, education, experience and ordinary prudence are accustomed to exercise under the same or similar circumstances, yet it may be assumed that a person of whatever age is able to appreciate the obvious risks incident to any sport or activity in which he may be able to engage with intelligence and proficiency, and must act accordingly.'" (*Id.* at p. 885.)

In *Kelsey v. Muskin Incorporated* (2d Cir. 1988) 848 F.2d 39, a 21 year old dove into an aboveground pool from a nearby railing, rendering him quadriplegic. The appellate court upheld the trial court's dismissal of the diver's complaint, finding: "Kelsey had just been in the pool; he plainly knew it was only four feet deep. The danger of a head-first dive into such a pool from the deck of a house some eight feet higher should have been obvious to a person of his age and diving experience." (*Id.* at p. 43.)

Hoffinger also points to California cases involving governmental immunity and dangerous dives. In *Valenzuela v. City of San Diego* (1991) 234 Cal.App.3d 258 (*Valenzuela*) and *Rombalski v. City of Laguna Beach* (1989) 213 Cal.App.3d 842, the court found cities immune for injuries suffered by teenagers diving from rocks into shallow ocean water at public beaches. Government Code section 831.7, subdivision (b) (2) provides government agencies immunity from liability for hazardous recreation activities, including "[a]ny form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning has been given."

In *Valenzuela*, the court stated, in conjunction with its discussion of appropriate warning signs, that "[t]he mere placement of signs in a dangerous area does not reasonably induce the public to believe all other areas are safe. [Citation.] This is especially true where the danger is obvious, such as jumping off a rock into shallow water." (*Valenzuela, supra,* 234 Cal.App.3d at p. 262.)

Hoffinger seizes upon this remark, claiming: "This Court has acknowledged that striking one's head is an inherent risk of diving into shallow water." However, this court did not decide Valenzuela, and the Valenzuela court did not determine, as a matter of law, that striking one's head is an inherent risk of diving headfirst from a raised platform into shallow water.

Interestingly, one of the cases cited by Hoffinger sets forth the schism between courts on the issue of whether diving into shallow pools constitutes an open and obvious danger. In *McCormick v. Custom Pools, Inc.* (Minn.Ct .App. 1985) 376 N.W.2d 471 (*McCormick*), a diver of undisclosed age was injured by a dive into the shallow end of a pool.

McCormick considered himself an experienced swimmer, had made a number of prior dives, knew he was diving into the shallow end, and intended to dive into the shallow end. (*Id.* at pp. 472-473.)

The Minnesota Court of Appeals affirmed summary judgment in favor of the pool manufacturer. The court, in considering McCormick's awareness of the risks involved in shallow diving, discussed two cases that reached opposite results in similar situations. In *Colosimo v. May Department Store Co.* (3d Cir. 1972) 466 F.2d 1234 (*Colosimo*), an experienced 15-year-old swimmer was injured when he dove off a pool ladder into a small aboveground pool less than three feet deep.[4] The court determined that neither the platform atop the pool ladder nor the absence of warning signs proximately caused the plaintiff's injuries. The plaintiff was aware of the risk of striking the bottom of the pool, and the court held the plaintiff's error of judgment in diving, not the dearth of warning signs, caused the accident. (*Id.* at p. 1236.)

Conversely, in *Corbin v. Coleco Industries, Inc.* (7th Cir. 1984) 748 F.2d 411 (*Corbin*), the court reversed summary judgment in favor of a pool manufacturer. The manufacturer argued, and the district court found, that the danger of diving into four feet of water is open and obvious. The appellate court disagreed, finding the plaintiff had produced evidence that "the danger of serious spinal cord injury from diving into shallow water is not open and obvious..." (*Id.* at p. 417.)

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[4]The plaintiff had eight years of swimming experience and four Red Cross courses in various aspects of swimming, including diving. (*Colosimo, supra,* 466 F.2d at p. 1235.)

In *Corbin*, the appellate court considered expert testimony regarding the public's belief that there is a safe way to dive into a shallow pool: "The crucial point made in this testimony is that even though people are generally aware of the danger of diving into shallow water, they believe that there is a safe way to do it, namely, by executing a flat, shallow dive. If people do in fact generally hold such a belief, then it cannot be said, as a matter of law, that the risk of spinal injury from diving into shallow water is open and obvious. Whether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see. In particular, if people generally believe that there is a danger associated with the use of a product, but that there is a safe way to use it, any danger there may be in using the product in the way generally believed to be safe is not open and obvious." (*Corbin, supra,* 748 F.2d at pp. 417-418.)

The *Corbin* court found a "genuine issue of material fact as to whether Corbin knew that he risked spinal injury by diving into shallow water, even if he attempted a flat, shallow dive. If he did not know this, then a conspicuous warning on the side of the pool could very well have deterred him from diving. Thus summary judgment for Coleco on the basis of Corbin's knowledge of the danger was inappropriate." (*Corbin, supra,* 748 F.2d at p. 418.)

After comparing the factual underpinnings in both *Colosimo* and *Corbin*, the court in *McCormick* found the facts before it more similar to those in *Colosimo*. The court noted the plaintiff in *Corbin* was an "average" swimmer who had never before swum in an aboveground pool. In contrast, the plaintiff in Colosimo was a very experienced swimmer. The appellate court affirmed the trial court's finding that as a matter of law McCormick was aware of the dangers of shallow diving: "In McCormick's deposition, he states

unequivocally that he was a good and accomplished swimmer and, at the time of the accident, he intended to do a 'body surf dive.' It appears from the record that McCormick knew he had to execute a surface dive to avoid the serious risks involved in shallow diving." (*McCormick, supra,* 376 N.W.2d at p. 476.)[5]

No Obvious Risk

A number of courts have considered the issue of diving into shallow pools and found the risk of serious injury neither open nor obvious. Bunch and McMasker urge us to follow these cases.

In *Fleck v. KDI Sylvan Pools, Inc.* (3d Cir. 1992) 981 F.2d 107 (*Fleck*), the adult plaintiff dove into a three-and-one-half foot deep, aboveground swimming pool and broke his neck. Neither the pool nor its replacement pool liner had depth markers or "no diving" warnings. Hoffinger, maker of the liner, had provided decals that had never been used. The plaintiff arrived at a party, drank four or five 12-ounce cups

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[5]Three judges dissented, citing expert testimony about the need for potent warnings about shallow diving. The expert stated: "'[P]ool manufacturers and installers have studies, and have sophisticated knowledge regarding the dangerous propensities of diving into the shallow end of a pool. The general public is not aware of this empirical data and its conclusions... [T]here is a great disparity between the sophisticated knowledge of the profit-oriented manufacturer and installer, and the ignorance of the pool user who has not studied the subject.'" (*McCormick, supra,* 376 N.W.2d at p. 478 (dis. opn. of Crippen, J.).) The dissent concluded: "There is a genuine issue whether the causative impact of respondent's fault, as indicated by appellant's expert, was great enough to permit recovery of a more experienced swimmer who was nevertheless vulnerable to lack of sophisticated information, general public misperceptions and the unwillingness of the manufacturers and suppliers to properly inform users or the public about the treacherous dangers in shallow diving." (*Id.* at pp. 478-479.)

of beer, smoked marijuana, and proceeded to climb to the deck surrounding the pool and dive in headfirst. The plaintiff had never previously used the pool and testified the pool looked six feet deep. The pool owner confirmed this impression, stating that at times the pool appeared 12 feet deep. The plaintiff testified that if there had been depth markers or warnings he would have known not to dive into the pool. (*Id.* at p. 112.)

The jury found that the liner lacked an element necessary to make it safe for reasonably foreseeable use and that the defect was a substantial factor in bringing about the harm. The jury awarded the plaintiff $10 million. (*Fleck, supra,* 981 F.2d at pp. 112-113.) On appeal, the defendants argued the danger associated with diving into a body of water of uncertain depth is open and obvious, and the axiom "'look before you leap'" should bar the plaintiff's suit. The appellate court disagreed. (*Fleck, supra,* 981 F.2d at p. 119.)

The *Fleck* court noted that whether a danger is open and obvious is an objective inquiry, not dependent upon the actual knowledge of the user or his actual awareness of the danger. The court explained: "We inquire whether knowledge of the danger would be possessed by 'the ordinary consumer who purchases [or uses the product], with the ordinary knowledge common to the community as to its characteristics.' [Citation.] For instance, '[i]f the product is one customarily used by children, the danger must be one which children would be likely to recognize and appreciate in order to prevent them from recovering for a product related injury on the grounds that the danger was open and obvious. [Citation.]." (*Fleck, supra,* 981 F.2d at p. 119.)

With these precepts in mind, the *Fleck* court concluded it is clearly foreseeable that children and adults would dive into a pool of unknown depth. The jury could

reasonably conclude that the plaintiff in *Fleck* believed the pool was six feet deep, since decking concealed the sides of the pool and the owner testified the depth was deceptive. According to the court, "[w]hile Fleck may still have been imprudent to do what he did, we cannot say that 'foolhardiness' was the cause of the accident. Fleck testified that had there been warnings about the depth of the pool or the danger of diving into this pool, he would not have attempted a dive. [¶] The danger was not open and obvious; so the product was defective, and there was a duty to warn." (*Fleck, supra,* 981 F.2d at p. 120.)[6]

In *Jonathan v. Kvaal* (Minn.Ct.App. 1987) 403 N.W.2d 256 (*Jonathan*), the Minnesota Court of Appeals found a plaintiff's knowledge of the extent of the danger in diving into a shallow pool presented a question of fact for the jury. The 24-year-old plaintiff in *Jonathan* had previously used the aboveground pool on at least 10 occasions. He was aware of a sign warning against jumping and diving and of depth markers. On one occasion, the plaintiff jumped into the pool from the nearby roof, rousing the pool owner's ire. (*Id.* at p. 258.) One evening, the plaintiff drank an unknown quantity of strong beer, jogged alongside the pool, and dove into the shallow end, severely injuring his spine. (*Ibid.*) The plaintiff considered himself a fair swimmer without any formal instruction and had previously made numerous shallow dives into the shallow end of the pool. (*Ibid.*) In opposing the defendant's motion for summary judgment, the plaintiff submitted an affidavit by an expert in pool design. The expert stated aboveground pools create risks of injury well known in the pool industry but unknown to the general public. (*Ibid.*)

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[6]The court also found Hoffinger failed to warn of the danger. (*Fleck, supra,* 981 F.2d at p. 120.)

The trial court granted summary judgment, finding the plaintiff was familiar with the pool based on his frequent use and also describing the plaintiff as an experienced swimmer and diver. The trial court determined the plaintiff's negligence was the sole cause of his injuries and the injuries were not caused by any breach of duty by the pool manufacturer. The appellate court reversed. (*Jonathan, supra,* 403 N. W. 2d at pp. 258-259.)

The court noted that the plaintiff's expert stated the general public was unaware that headfirst diving into aboveground pools posed a risk of serious injury. The plaintiff stated he was unaware he was risking serious injury by entering the pool from ground level. The court concluded: "Here, Jonathan's knowledge as to the extent of the danger in using the pool is a fact issue for the jury. Here, our analysis is not limited to questions of breach of duty only but involve, as well, issues of causation, for liability does not arise unless and until there is a breach of duty that is a direct cause of injury. These are triable issues of fact not to be resolved by summary judgment." (*Jonathan, supra,* 403 N.W.2d at pp. 261- 262.)[7]

Children Diving Into Shallow Water

Most of the cases discussed thus far involved adults injuring themselves after diving into shallow water. However, in this case we consider a diving accident involving Bunch, 11 years old at the time of the tragedy. Courts considering diving mishaps involving children perceive "open and obvious" dangers in a slightly different light than dangers involving adults.

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[7]Several judges dissented in *Jonathan*, finding the plaintiff's intentional dive into a shallow pool was the sole cause of his injuries. (*Jonathan, supra,* 403 N.W.2d at pp. 263-268.)

A 14 year old attempted a shallow dive from a trampoline into an aboveground pool in *Klen v. Doughboy Recreational, Inc.* (Ill.App. 1994) 643 N.E.2d 1360 (*Klen*). Prior to the dive, the plaintiff stood and walked around the perimeter of the pool, knew the water was chest deep, and knew that the sides of the pool were about four feet high. The plaintiff had taken seven years of swimming lessons and had learned to dive in both deep and shallow water. He also had experience in swimming in similar aboveground pools. The plaintiff stated he understood it was possible to dive into shallow water without injury by executing a flat, racing-type dive that others had performed the night of the accident. He believed the dive he was attempting was safe. (*Id.* at pp. 1362-1363.)

Rendered quadriplegic by the accident, the plaintiff filed suit against the pool manufacturer, alleging a failure to warn of the risk of permanent neurological injury presented by the intended and foreseeable use of the pool. (*Klen, supra*, 643 N.E.2d at p. 1362.) The trial court denied summary judgment to the defendant pool manufacturer, finding a question of fact existed as to whether the risk of quadriplegia was open and obvious to a 14 year old and "'whether or not a 14 year old is chargeable with knowledge of circumstances that people who are adults who have experience would be chargeable.'" (*Id.* at p. 1364.)

The pool manufacturer appealed, arguing the trial court erred in applying a subjective standard to the duty to warn and urging the use of an adult standard of reasonableness. (*Klen, supra,* 643 N.E.2d at pp. 1364-1365.) The appellate court affirmed the denial of summary judgment.

The Appellate Court of Illinois began by noting: "A duty to warn of an unreasonably dangerous condition [fn.

omitted] extends to the use of the product by an ordinary person with the ordinary knowledge common to the community regarding the characteristics of the product. [Citation.] The duty to warn is determined using an objective standard, *i.e.*, the awareness of an ordinary person [citation], and is normally a question of law [citation], although when the record is in dispute, it becomes a question of fact [citation]. [¶] The duty to warn analysis, which is an objective one, should focus on the typical user's perception and knowledge. The plaintiff's subjective knowledge is immaterial to the antecedent determination of an open and obvious danger." (*Klen, supra,* 643 N.E.2d at p. 1363.)

The court disagreed with the defendant's assertion that the trial court had shifted from an objective standard to a subjective standard in denying summary judgment. Rather, "the standard remained an objective one, but the reasonable person standard was that of a reasonable child of fourteen years of age rather than a reasonable adult." (*Klen, supra,* 643 N.E.2d at p. 1365.)

As to the issue of whether the open and obvious nature of the danger should be judged by the standard of a reasonable adult or child, the court noted the age of the plaintiff was relevant in products liability cases and premises liability cases. (*Klen, supra,* 643 N.E.2d at p. 1365.) The court considered various cases that recognized a distinction must be made between an adult's ability to recognize and appreciate certain risks and a child's corresponding ability.

The court concluded: "Certain conditions considered harmless to adults may not be so to the general class of children who, by reason of their immaturity, might be incapable of appreciating the risk involved. [Citation.] The conclusive finding that children, due to their immaturity might be incapable of appreciating certain risks open and

obvious to adults, is no less conclusive when children are exposed to dangerous risks from products rather than from conditions on the land. Since it would be illogical to expect the danger created by a condition of a product to be any more obvious than a danger created by a condition on the land, where the use of a product by children is reasonably foreseeable, as is the case here, the determination of what is open and obvious to children should be based upon what is true for children as opposed to what is true for adults. Thus, in the instant case the determination of whether the risk of paraplegia was open and obvious must be judged by the reasonable or objective class of fourteen-year-olds..." (*Klen, supra*, 643 N.E.2d at p. 1366.)

The *Klen* court also reviewed cases involving children making shallow dives into a public lake. In *Schellenberg v. Winnetka Park District* (Ill.App. 1992) 596 N.E.2d 93 (*Schellenberg*), the defendant park district argued the danger of shallow dives was obvious and understood by a 15-year-old diver. The *Schellenberg* court disagreed, noting: "'[T]he danger of diving head first into shallow water may seem at first glance to be a matter of common knowledge and understanding for which expert opinion is not needed. However, closer examination of the evidence indicates that the nature and extent of the danger of surface or horizontal diving by teenagers in all probability is not commonly understood, even by many adults of considerable experience.'" (*Id.* at p. 96.)

The *Klen* court then reviewed *Corbin* and *Glittenberg*, which we have previously discussed. As to *Corbin*, the court noted: "To the extent *Corbin* finds that the danger of executing a flat or 'shallow' dive by an adult is not open and obvious, we do not reach that conclusion here nor do we necessarily agree that it would not be open and obvious to an adult. [Citation.] We do believe, however, that

the reasoning in *Corbin* does have application with respect to minors and is in accord with... *Schellenberg*..." (*Klen, supra*, 643 N.E.2d at pp. 1368-1369.) The court also distinguished *Glittenberg*, noting the plaintiff in *Glittenberg* was an adult. (*Id.* at p. 1369.)

Ultimately, the court concluded, based upon the evidence and pleadings before it, "it is by no means evident that, as a matter of law, the dangers of 'shallow' or surface diving into a shallow pool are open and obvious to minors... Where there is doubt, the obviousness of the danger is for the jury to determine... [¶]... [¶] It would further seem that having made the determination that the risk of executing 'shallow' or surface dives is not open and obvious to minors as a matter of law, the jury could then be asked to redetermine this question as an issue of fact. In addition, the defense is not precluded from raising the subjective awareness of the Plaintiff as a question of fact with respect to assumption of risk [citation] and proximate cause." (*Klen, supra*, 643 N.E. 2d at pp. 1369-1370.)

We find the reasoning of *Klen* persuasive. As our review of cases from various jurisdictions makes clear, courts have grappled with the issue of *adult* awareness of the dangers of diving into shallow water. The results have been mixed, with several courts sharply divided over whether such danger is open and obvious to an adult. Courts have considered prior swimming and diving experience, familiarity with the pool in question, and the public's general awareness of diving dangers in determining whether the danger is open and obvious to adults. It appears absurd and somewhat illogical to consider these factors in determining an awareness of danger but to ignore or exclude the age of the diver.

Lacking any guidance from California law, we adopt the reasoning of *Klen* and find that the danger of diving into a shallow aboveground pool is not open and obvious to an 11 year old as a matter of law. Therefore, the trial court did not err in declining to enter a directed verdict in favor of Hoffinger.

II. Assumption of Risk

Hoffinger argues the trial court misapplied the doctrine of primary assumption of risk, which, if applied correctly, would provide a complete defense against Bunch's claims. Bunch and McMasker respond that assumption of risk is not an available defense in a products liability action.

Under the doctrine of primary assumption of risk, a person who chooses to engage in a sporting activity may not generally recover damages for injuries that result from risks inherent in the sport. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 320 (*Knight*).) Where the risk of harm is so inextricably a part of the sport and so obvious to any participant, a defendant is relieved of any duty that might otherwise exist. As Justice Cardozo reflected, "One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary... The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility... The timorous may stay at home." (*Murphy v. Steeplechase Amusement Co.* (N.Y. 1929) 166 N.E. 173, 174.)

Hoffinger contends assumption of risk applies because, in diving, Bunch engaged in a sport that required a certain amount of skill. Diving into a shallow pool involved a potential risk of injury, and the assumption of risk doctrine derives from the realization that some activities involve risk.

However, assumption of risk does not insulate equipment suppliers from liability for injury from providing defective equipment. In *Bjork v. Mason* (2000) 77 Cal.App.4th 544 (*Bjork*), a plaintiff riding behind a motorboat in an inner tube was injured when the rope broke and struck him. The trial court applied the assumption of risk doctrine and granted the boat driver's summary judgment motion. The court found the driver a coparticipant who had done nothing to increase the risk.

The appellate court reversed. The court found the driver more than a coparticipant; he had provided the rope that injured the plaintiff. As the supplier, the driver was not covered by assumption of the risk but was subject to general negligence rules. The court concluded: "[T]he act of supplying the equipment is something separate and distinct from participation in the sport and the tests for liability are accordingly different." (*Bjork, supra,* 77 Cal.App.4th at p. 553, italics omitted.) The driver, by supplying the defective rope, increased the risk of harm to the plaintiff beyond what was inherent in the sport. (*Id.* at p. 554.)

In *Milwaukee Electric Tool Corp. v. Superior Court* (1993) 15 Cal.App.4th 547 (*Milwaukee*), the court considered assumption of risk in a products liability context. In *Milwaukee*, the plaintiff suffered injuries while using a heavy-duty drill manufactured by the defendant. The defendant moved for summary adjudication, arguing the undisputed facts established the plaintiff's claim was barred by primary assumption of the risk. The appellate court affirmed the trial court's denial of the defendant's summary adjudication motion.

The court reasoned that primary assumption of risk "'embodies a legal conclusion that there is "no duty" on the part of the defendant to protect the plaintiff from a particular

risk...'" (*Milwaukee, supra,* 15 Cal.App.4th at p. 560, quoting *Knight, supra*, 3 Cal.4th at p. 308.) However, under products liability, the manufacturer does owe a duty to produce defect-free products. (*Milwaukee, supra*, 15 Cal.App. 4th at p. 562.) In addition, in using a defective product, the user does not intend to confront a risk that is inherent in its use. (*Id.* at pp. 562-563.) To the extent the user does elect to use the product with knowledge of the danger posed by the defect, the user's actions are subsumed by comparative negligence. The manufacturer is not relieved of its duty to make a product without defect. (*Ibid.*)

The *Milwaukee* court concluded: "[W]e believe that the purposes of strict products liability doctrine will be well served by a finding that a manufacturer owes a duty to a user of its product, thus making the primary assumption of the risk doctrine inapplicable, absent some extraordinary circumstance..." (*Milwaukee, supra*, 15 Cal.App.4th at p. 565.)

Hoffinger cites *Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703 (*Sanchez*) for the proposition that assumption of risk does apply in cases involving sporting equipment. In *Sanchez*, a college baseball pitcher suffered serious injuries when struck by a line drive hit by an aluminum bat. The pitcher sued the bat manufacturer and others, alleging the bat's design significantly increased the risk inherent in the sport of baseball that a pitcher would be hit by a line drive. (*Id.* at pp. 706-707.) The manufacturer successfully moved for summary judgment based on primary assumption of risk and that the pitcher would be unable to prove causation. (*Id.* at p. 707.)

The appellate court reversed. The court found the pitcher presented sufficient evidence to establish that the use of the aluminum bat significantly increased the inherent risk

that a pitcher would be hit by a line drive. (*Sanchez, supra*, 104 Cal.App.4th at p. 707.) However, the court did not discuss the interplay between products liability and primary assumption of risk. Nor did the court discuss or distinguish *Milwaukee*. The *Sanchez* court simply found a triable issue of fact existed as to whether primary assumption of risk applied to the facts before it. (*Id.* at p. 715.) *Sanchez* thus does not assist Hoffinger.

III. Proximate Cause

Having already considered and dispatched Hoffinger's contention that it owed no duty to warn Bunch of the danger of diving because the danger was open and obvious, we next consider a different incarnation of the argument. A manufacturer is liable only if the product was a proximate cause of the plaintiff's injury. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572; *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 120.) According to Hoffinger, Bunch "had been warned not to dive, that she could be hurt if she dove, and she dove anyway." Further, "the danger associated with executing a headfirst vertical dive from a chair into water known to be less than four feet in depth is open and obvious." Bunch's own actions, Hoffinger argues, not the lack of sufficient warning labels, were the proximate cause of her injuries.

"'In the context of products liability actions, the plaintiff must prove that the defective products supplied by the defendant were a substantial factor in bringing about his or her injury.'" (*Whiteley v. Philip Morris,* Inc. (2004) 117 Cal.App.4th 635, 696.) "'The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.' [Citation.] Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss

is not a substantial factor' [citation], but a very minor force that does cause harm is a substantial factor [citation]. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 (*Bockrath*).) A plaintiff need not establish that a defendant's product was the sole potential proximate cause of injury, but only that the defendant's conduct substantially contributed to the injury and the circumstances make it just to hold the defendant responsible for the consequences of the accident. (*Bates v. John Deere Co.* (1983) 148 Cal.App.3d 40, 50.)

A plaintiff's misuse of a product may be a cause of the plaintiff's injuries. However, if the product's manufacturer could foresee the misuse, the manufacturer remains liable unless it provides an adequate warning. A manufacturer is required to foresee some degree of misuse and abuse of a product and to take reasonable precautions to minimize the resulting harm. (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833.) As Bunch points out, the extent to which a manufacturer must anticipate the misuse of its product and the adequacy of a product warning present issues of fact. (*Id.* at p. 835.) Our review is limited.

Here, the jury could find Hoffinger's pool design the proximate cause of Bunch's injuries if it found the pool's design was a "more than negligible or theoretical" factor that contributed to Bunch's injuries. We note the trial court instructed the jury in the concept of "substantial factor" in relation to both design defect and failure to warn. The court instructed that the jury must find "that the design of the warning system for the pool liner was a substantial factor in causing harm to the plaintiff." The court also instructed that the jury must find a "lack of sufficient warnings was a substantial factor in causing plaintiff's harm."

Hoffinger concedes Bunch need not establish that its product was the only potential proximate cause of her injuries, but argues "any alleged deficiency falls far short of being a causal substantial factor in this incident." Instead, Hoffinger points to a variety of other causes of the tragedy: Mrs. Frank's decision to leave four young children unsupervised, Mr. Frank's decision not to affix the warning labels supplied with the replacement liner, and Bunch's decision to disregard the warnings and dive into the pool. Therefore, Hoffinger contends, the record "fails to establish or support an inference that more or different warnings would have prevented this accident: in other words, as a matter of law, there is no evidence of cause in fact or legal causation attributable to any alleged failure by [Hoffinger]." In effect, Hoffinger challenges the sufficiency of the evidence to support the jury's finding that its product was a substantial factor in bringing about Bunch's injuries.

In determining whether a judgment was supported by substantial evidence, we consider all the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving conflicts in favor of the judgment. We do not reweigh the evidence, but instead determine whether the record contains substantial evidence, contradicted or uncontradicted, to support the judgment. (*McMahon v. Albany Unified School Dist.* (2002) 104 Cal.App.4th 1275, 1282.)

At trial, Bunch testified she believed Mrs. Frank's admonition against diving was just "being a mom, and mom's [sic] say no all the time." Bunch believed the warning sticker showing a man doing a "pike" dive and stating "caution" meant do not do a pike dive. After being shown a 1989 Doughboy caution label depicting a man with lightning bolts coming out of his head and stating "crippling injury" and "danger," Bunch testified such a warning would have

prevented her from diving the day of the accident. Bunch stated she did not know she could break her neck if she dove into four feet of water.

Dr. Buck, Bunch's expert, testified that a young diver standing at the edge of an aboveground pool cannot necessarily judge the depth of the pool. Warnings act as "brakes to stop dangerous behaviors." Warnings to children between the ages of seven and 12 must be concrete and spell out the dangers and consequences of actions in order to be effective. Buck found the labels supplied with the Hoffinger pool liner neither adequate nor effective. The labels failed to spell out any consequences of diving into shallow water. Buck reviewed the history of warning labels and claims of injury and found that the instances of injury decreased as the explicitness of the warnings increased.

Dr. Johnson, another of Bunch's experts, testified that based on his experience and research, the risk of spinal paraplegia was not readily apparent to an 11 year old. Many people who dive into pools are unable to gauge the depth of the water. After reviewing the facts, Johnson opined that Bunch was attempting a shallow racing dive and was unaware of the possible consequences of that dive.

Johnson also testified that pool industry standards require manufacturers to prominently display permanent warnings on their pools. Johnson outlined several methods of installing adequate warnings during a pool's manufacture.

Given the testimony of Bunch and her two expert witnesses, we find sufficient evidence to support the conclusion that the lack of an adequate warning label was neither a negligible nor theoretical contribution to Bunch's injury. The evidence presented at trial revealed that the lack of a persuasive label outlining the consequences of diving

into the pool was a substantial factor in causing the injury. As the Supreme Court points out, "'a very minor force that does cause harm is a substantial factor.'" (*Bockrath, supra,* 21 Cal.4th at p. 79.) Here, at the very least, the lack of an effective warning was a minor force in bringing about the fateful dive.

IV. Evidence of Prior Claims History

Hoffinger contends the trial court erred by allowing Bunch to refer to Hoffinger's claims history without a prior showing that the claims were substantially similar to the incident in question. Prior to trial, Hoffinger filed a motion in limine to exclude such evidence. On appeal, Hoffinger argues the court erred in not granting the motion and in later allowing such evidence during trial.

During oral argument on the motion in limine, the trial court found that evidence of prior claims against Hoffinger for diving injuries was relevant to prove a dangerous condition and notice of a hazardous condition. The court considered the issue of similarity between the prior claims and the current claim and found the important points of similarity to be the depth of the pool involved and whether or not the injury involved diving. The court held these prior claims admissible to show Hoffinger had notice that divers were being injured in its pools. In addition, the court held Bunch would be required to make a showing of substantial similarity prior to introducing evidence concerning the prior incidents. However, the court neither granted nor denied the motion.

We apply the abuse of discretion standard of review to any ruling by the trial court on the admissibility of evidence. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) The appellant bears the burden of demonstrating

both that the evidence was erroneously admitted and that the error was prejudicial. Evidentiary rulings will be deemed harmless if the record demonstrates the judgment was supported by the rest of the evidence properly submitted. (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1122.)

Hoffinger never requested a ruling on the issue. Nor did Hoffinger object when Bunch questioned its expert, Cargile, concerning prior claims for quadriplegic injuries from dives into Hoffinger pools. Hoffinger also failed to object when Bunch asked the court to admit Hoffinger's summary of prior accidents.

Hoffinger's failure to request a ruling on the motion, followed by its failure to object to the introduction of prior claims evidence during trial, dooms its argument. When counsel fails to obtain rulings in the trial court on objections to evidence, the objections are waived and are not preserved for appeal. (*People v. Far West Ins. Co.* (2001) 93 Cal.App.4th 791, 798, fn. 3.)

Hoffinger also argues the trial court erred in failing to hold a hearing pursuant to Evidence Code section 402 to determine whether the prior accidents were substantially similar. The record reveals Hoffinger never requested such a hearing.

Moreover, even assuming Hoffinger preserved the issue on appeal, we find no merit in its claim of error. Evidence of prior injuries from a product is admissible in a products liability action to prove the product is defective and to prove defendant's knowledge of the defect. Prior accidents are admissible if similar in substance and not too remote in time. (*Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal .3d 540, 555.) As the Supreme Court observed, to be admissible,

"""""all that is required... is that the previous injury should be such as to attract the defendant's attention to the dangerous situation."""" (*Ibid.*)

Here, the trial court outlined the similarities necessary to make a prior incident admissible: depth of pool and type of injury. We find no abuse of discretion on the part of the trial court.

V. Bifurcation of Trial

Hoffinger claims the trial court erred by failing to bifurcate the liability and damages phases of the trial. According to Hoffinger, the trial court's failure to bifurcate resulted in a miscarriage of justice. The court, in denying the motion, forced the jury to confront "the unenviable task of denying compensation to an eleven-year-old girl that will be in a wheelchair for the rest of her life."

The Code of Civil Procedure authorizes bifurcation of damages from liability at trial when "the ends of justice... would be promoted thereby" (Code Civ. Proc., § 598) and "in furtherance of convenience or to avoid prejudice" (*id.* at § 1048). Bifurcation is a matter within the trial court's discretion that we will not disturb on appeal absent a manifest abuse of discretion. (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086.)

In its motion, Hoffinger sought bifurcation "on the ground that the convenience of the witnesses, the ends of justice and the economy and efficiency of handling the litigation will be promoted thereby." Hoffinger did not request bifurcation based on potential prejudice.

In response, Bunch argued that if liability and damages were tried separately, she would incur substantial witness expenses. Eleven of her 16 witnesses, including the experts, would have to make multiple appearances at trial.

The trial court denied Hoffinger's motion, noting there was "too much overlapping of evidence on the two issues, so that a bifurcation would result in too much duplication of evidence and court time." We find no abuse of discretion in the trial court's decision. The trial court denied bifurcation based on economy, efficiency, and convenience to witnesses, grounds supported by the record.

VI. Evidence of Default Judgment and Enforcement of the Covenant Not to Sue

Finally, Hoffinger contends the trial court erred in refusing to allow introduction of evidence concerning McMasker's default judgment. In addition, Hoffinger argues the trial court's refusal to enforce Bunch's covenant not to sue violated its due process rights.

A. Default Judgment

Following the accident, Bunch sued a variety of defendants, including McMasker, for $20 million. After McMasker failed to answer Bunch's complaint, Bunch obtained a default judgment against McMasker. McMasker's insurance carrier settled with Bunch for the policy limit of $1 million.

At trial, Hoffinger sought to admit evidence regarding the default judgment. Hoffinger argued the evidence was relevant to show why McMasker's insurer settled with Bunch for the policy limit. According to Hoffinger, the default had exposed McMasker to a possible

$20 million judgment, and "there may be arguments" that McMasker's insurer was responsible for the default and might have been liable to McMasker for as much as $20 million if it did not pay over the $1 million policy.

The trial court inquired as to the evidence in support of Hoffinger's assertions. Hoffinger acknowledged it had no evidence to support its claim that the default prompted the policy limit settlement and stated no discovery had been conducted on the issue.

The court found the evidence inadmissible. The court could envision no circumstance in which McMasker's insurer could be held liable for more than the $1 million policy limit. The court found no incentive for the insurer to settle for the policy limit unless the claim warranted settling. In addition, Hoffinger could not present any evidence that McMasker's insurer could be held liable for more than the policy limit.

The court noted that McMasker explained in detail its reasons for believing Bunch's claim exposed it to the policy limits. McMasker's expert testified at trial that a prudent insurance company with the same facts available and the applicable law would have made the same decision as that made by McMasker's insurer.

The court also found introduction of the default would open up issues regarding default judgments in general, coverage, notification, insurance, and McMasker's corporate status and bankruptcy. These burgeoning issues could not be adequately explored in the time allotted for trial and would divert attention from the primary issue of products liability. Finally, the court noted Hoffinger's failure to conduct discovery regarding the default or to obtain expert testimony regarding settlement policies. Cross-examination

of McMasker's experts regarding the default would amount to improper discovery on the witness stand before the jury.

Initially, the court denied any reference to the default in Hoffinger's opening statement, postponing a final ruling until McMasker's relevant witnesses were called. When Hoffinger renewed its motion during expert testimony, the court denied the motion under Evidence Code section 352. The court found the relevance of the evidence "marginal."

Under Evidence Code section 351, "all relevant evidence is admissible" except as otherwise provided by statute. To be relevant, evidence must have the tendency to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.)

The trial court possesses the discretion to exclude evidence if its probative value is substantially outweighed by the probability its admission will necessitate undue consumption of time or create a substantial danger of undue prejudice, confusion, or of misleading the jury. (Evid. Code, § 352.)

Here, the trial court carefully considered the probative value and prejudicial impact of admitting evidence of the default judgment. The court found the motive for McMasker's insurance carrier's payment of the settlement unrelated to the central issue at trial: whether the pool liner was defective. The court also found the evidence would consume an inordinate amount of time. We agree with the trial court's balance of prejudice and probative value and cannot find it abused its discretion in finding evidence of the default inadmissible.

B. Covenant Not to Sue

Hoffinger faults the trial court for "erroneously" permitting this matter to proceed to trial despite Bunch's prior covenant not to sue Hoffinger. On the eve of trial, Hoffinger filed a motion to dismiss based on the covenant not to sue. The court denied the motion.

Bunch's settlement with McMasker included the following provision: "Leesa Bunch, through counsel, covenants today not to sue or settle with [Hoffinger] as those will be the targets of a cross-complaint by McMasker and Waterworks, and that [McMasker] will attempt to join in this action to prosecute those cross-complaints with the now pending action." The settlement was entered into the record and approved after notice to all parties.

Bunch opposed Hoffinger's motion to dismiss, and Bunch and McMasker requested the court set aside the settlement provision against suing Hoffinger. Bunch and McMasker explained that the purpose of the covenant not to sue provision was to protect McMasker. McMasker intended, following settlement with Bunch, to sue Hoffinger for indemnity and feared its indemnity rights might be affected if Bunch sued Hoffinger and Hoffinger cross-complained against McMasker. According to counsel, "At no time did the parties expect or intend that the order of good faith would do anything other than cut off Hoffingers' [sic] rights to cross complain."

Following the settlement, Bunch's counsel found legal authority supporting a products liability claim against Hoffinger. Bunch and McMasker agreed to modify the settlement agreement to allow Bunch to sue Hoffinger. The trial court granted Bunch's request for relief from the

covenant not to sue and denied Hoffinger's motion to dismiss.

Hoffinger argues it is a third party beneficiary to the original settlement. As a third party beneficiary, Hoffinger contends Bunch and McMasker could not alter the agreement without its consent. Bunch and McMasker argue that *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337 (*Neverkovec*) supports the trial court's decision. In *Neverkovec*, the plaintiff settled with one of several defendants, signing a settlement agreement that released all other defendants from liability. Another defendant successfully sought summary judgment based on the release. (*Id.* at pp. 341-344.)

The appellate court reversed. The court found the defendant was not a third party beneficiary to the settlement agreement: "'A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him.' [Citations.] The circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement. The contracting parties must have intended to confer a benefit on the third party." (*Neverkovec, supra,* 74 Cal .App. 4th at p. 348.) The court also found the party seeking to enforce a contract as a third-party beneficiary "bears the burden of proving that the promise he seeks to enforce was actually made to him personally or to a class of which he is a member." (*Id.* at pp. 348-349.)

In the present case, the settlement provision Hoffinger seeks to enforce was not intended to benefit Hoffinger. The parties drafted the covenant not to sue solely to preserve McMasker's right to indemnity against

Hoffinger.[8] Nor did Hoffinger provide any evidence that the covenant not to sue was made to it personally; Hoffinger stated it was unaware of the settlement terms until just prior to trial.

Hoffinger argues Bunch and McMasker's settlement was not a "mistake" that can be argued as a reason to reform the document, citing *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516 (*Hess*). However, *Hess* does not hold that mistake is the only defense to an effort by a party who seeks to enforce a contract provision as a third party beneficiary. *Hess* allows the contracting parties to show that they never intended to benefit the third party "by reference to the circumstances under which it was made, and the matter to which it relates.'" (*Id.* at p. 524.) Here, Bunch and McMasker offered evidence to support their claim that the covenant not to sue was never intended to benefit Hoffinger. Accordingly, the trial court did not err in denying Hoffinger's motion to dismiss.

DISPOSITION

The judgment is affirmed. Bunch and McMasker shall recover costs on appeal.

RAYE, J.

We concur:

SCOTLAND, P.J.
NICHOLSON, J.

---

[8]In its request for an order to set aside the covenant not to sue, McMasker states: "The intended purpose of that Application was to cut off any cross complaints that may be later filed by the non-settling Hoffinger parties." The request also states that McMasker "requested that Leesa [Bunch] forego any suits against Hoffinger, so that McMasker's cross-complaint for indemnity would not be eliminated by a good faith settlement between Leesa and Hoffinger."

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

[DATE STAMP]

LEESA BUNCH, etc.,
Plaintiff and Respondent,
v.
HOFFINGER INDUSTRIES, INC. et al.,
Defendants, Cross-Defendants and Appellants;
MCMASKER ENTERPRISES, INC.,
Cross-Complainant and Respondent.

C040177
Glenn County
No. 30534

BY THE COURT:

The petition for rehearing by appellant Hoffinger Industires, Inc., is denied.

Dated: December 7, 2004

SCOTLAND, P.J.

cc: See Mailing List

MAILING LIST

Re: Bunch etc. et al. v. Hoffinger Industries, Inc.
C040177 Glenn County No. 30534

Copies of the attached document have been sent to the individuals checked below:

✔ Charter Miller Davis
Whitney Davis
P.O. Box 15408
1515 K Street, Suite 500
Sacramento, CA 95851

✔ Jay-Allen Eisen Law Corporation
Jay-Allen Eisen
980 9th Street, Suite 1900
Sacramento, CA 95814

✔ Foley & Lardner
Robert J. Wenbourne
1215 K Street, Suite 1920
Sacramento, CA 95814-3404

✔ Finley and Buckley
Chad D. Graddy
2931 North Druid Hills Road, Suite C
Atlanta, GA 30329

✔ Finley and Buckley
Timothy Buckley
2931 North Druid Hills Road, Suite C
Atlanta, GA 30329

✔ Finley & Buckley
Dennis A. Brown

2931 North Druid Hills Road, Suite C
Atlanta, GA 30329

✔ Jeffrey G. Nevin Law Corporation
Jeffrey G. Nevin
50 California Street, Suite 1500
San Francisco, CA 94111

✔ Brooklyn Law School
Aaron D. Twerski
250 Joralemon St.
Brooklyn, NY 11201

✔ Cornell Law School
James A. Henderson
Ithaca, NY 14853

✔ Glenn County Consolidated Courts
526 West Sycamore Street
Willows, CA 95988

[DATE STAMP]

Court of Appeal, Third Appellate District – No. C040177
S130127

[DATE STAMP]

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LEESA BUNCH a Minor etc., Plaintiff and Respondent,

v.

HOFFINGER INDUSTRIES INC., Defendants,
Cross-defendants and Appellants;

MCMASKER ENTERPRISES INCORPORATED,
Cross-complainant and Respondent.

Petition for review DENIED.

Baxter, Chin, and Brown, JJ., are of the opinion the petition should be granted.

GEORGE
Chief Justice

WHITNEY A. DAVIS, BAR # 149523
KAREN G. SHINE, BAR # 182928
HARDY ERICH BROWN & WILSON
A Professional Corporation
1000 G Street
Sacramento, California 95814
P.O. Box 13530
Sacramento, California 95853-4530
(916) 449-3800

[DATE STAMP]
SUMMONS ISSSUED COUNSEL

Attorneys for Minor Plaintiff Leesa Bunch,
by and through her guardian ad litem, Terry Bunch

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

DELAY REDUCTION CASE

LEESA BUNCH, by and through her
guardian ad litem, TERRY BUNCH,
Plaintiff,

v.

No. 30534
COMPLAINT FOR
PERSONAL INJURIES

HASBRO, INC.; K MART CORPORATION;
MONTGOMERY WARD & COMPANY, INC.;
RANGER INDUSTRIES, INC. as successor-in-interest
to COLECO INDUSTRIES, INC.;
SLM INTERNATIONAL, INC., formerly SLM ACTION
SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

COMES NOW Plaintiff, LEESA BUNCH, by and through her guardian ad litem, Terry Bunch, and alleges as follows:

FIRST CAUSE OF ACTION
(Product Liability – Negligence)

1. The true names or capacities, whether individual, corporate, associate or otherwise of defendants DOES 1 through 25, inclusive, are unknown to plaintiff who therefore sues said defendants under such fictitious names. Each of the defendants

[BREAK]

SIXTH CAUSE OF ACTION
(Punitive Damages)

30. Plaintiff incorporates by reference paragraphs 1 through 28 of this Complaint, as though fully set forth herein.

31. Defendants knowingly and willfully failed to adequately warn users of the dangers of above-ground swimming pools. This disregard for the rights and safety of others was conscious, willful, wanton, malicious and oppressive, rising to the level of despicable conduct within the meaning of Civil Code, section 3294, subdivision (c), and therefore justifies an award to plaintiff of exemplary and punitive damage in the amount of $30 million.

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. General damages in excess of the minimum jurisdiction of this Court;

2. Medical and incidental damages, past, present and future, according to proof;

3. Damages for future loss of earnings and/or earning capacity, according to proof;

4. Exemplary and punitive damages in an amount according to proof;

5. Interest and/or prejudgment interest on all damages sought and/or incurred herein, at the legal lawful rate;

6. Costs of suit incurred herein; and

[BREAK]

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KAREN G. SHINE, BAR # 182928
HARDY ERICH BROWN & WILSON
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1000 G Street
Sacramento, California 95814
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Sacramento, California 95853-4530
(916) 449-3800

[DATE STAMP]

Attorneys for Minor Plaintiff Leesa Bunch,
by and through her guardian ad litem, Terry Bunch

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her
guardian ad litem, TERRY BUNCH,
Plaintiff,

v.

No. 30534
AMENDMENT TO COMPLAINT TO
SUBSTITUTE TRUE NAME OF
"DOE" DEFENDANT

HASBRO, INC.; K MART CORPORATION;
MONTGOMERY WARD & COMPANY, INC.;
RANGER INDUSTRIES, INC. as successor-in-interest
to COLECO INDUSTRIES, INC.;
SLM INTERNATIONAL, INC., formerly SLM ACTION
SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

Plaintiff amends the complaint in this action as follows:

Plaintiff has learned that the true name of the defendant designated in the complaint as a fictitious DOES is as set forth below:

TRUE NAME	FICTITIOUS NAME
McMasker Enterprises, Inc., dba Waterworks Unlimited	DOE 2

[BREAK]

trust. That settlement is subject to good faith settlement, this Court's approval of the minor's compromise and approval by the bankruptcy court in the state of New York.

7. A prior settlement was achieved between plaintiffs and the insurer for the homeowner who owned the subject pool. The amount of that settlement was $300,000. The minor's compromise was approved regarding that claim. A true and correct copy of the Order Approving Minor's Compromise on previous settlement is attached hereto as Exhibit D. The proceeds from that settlement remain in a court-blocked account, pending the establishment of the Leesa Bunch Special Needs Trust. No Medi-Cal reimbursement has yet taken place from those settlement proceeds, but that reimbursement will take place upon court approval in the near future.

8. A Medi-Cal lien exists in this case which totals $918,366.20. A true and correct copy of the Medi-Cal lien statement is attached hereto as Exhibit E. DHS's reimbursement is limited to the total lien, less 25%. (Welf. & Inst. Code, § 14124.791.) When the settlement amount is less than the total amount of the lien, Medi-Cal is entitled to

only 1/2 of any settlement proceeds, after deducting attorney fees and costs. (*Id.* at § 14124.78.)

9. Petitioners have contracted for representation with the law firm of Hardy Erich Brown & Wilson, and for the payment of a 25% contingency attorneys' fee, after deducting reasonable costs of suit. As of the filing of this motion, costs total $29,030.00. A true and correcy copy of the billings for costs generated thus far is attached hereto as Exhibit F. It is

EXHI BIT D

ANTHONY D. OSMUNDSON, #41503
WHITNEY A. DAVIS, BAR # 149523
HARDY ERICH BROWN & WILSON
A Professional Corporation
1000 G Street
Sacramento, California 95814
P.O. Box 13530
Sacramento, California 95853-4530
(916) 449-3800

[DATE STAMP]

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

IN THE MATTER OF THE DISPUTED
CLAIM OF LEESA BUNCH, a Minor,
by and through her Guardians ad litem,
Terry Bunch and Bileta Bunch,

No. 29527
EX PARTE ORDER
FOR DISBURSEMENT
Date:
Time:
Dept:

Upon review of the accompanying Petition for Approval of Settlement, it is the order of this court:

1) That the above compromise is approved;

2) That the establishment of a Special Needs Trust is approved pursuant to Probate Code section 3604;

3) That the U.S. Bank of California, N.A. is appointed the Trustee for said trust;

4) That the settlement proceeds be deposited into. a blocked interest-bearing account at U.S. Bank pending final approval of the Trust by the California Department of Health Services;

5) That the amount of $60,140.48 be immediately distributed from the settlement proceeds in the blocked account, payable to Bileta and Terry Bunch for reimbursement of medical expenses incurred;

6) That the title to the customized van purchased for Leesa's benefit be transferred to the Leesa Bunch Special Needs Trust, upon final approval of that trust.

APR 29 1996

ROY G. MacFARLAND
JUDGE OF THE SUPERIOR COURT

WHITNEY A. DAVIS, BAR # 149523
KAREN G. SHINE, BAR # 182928
HARDY ERICH BROWN & WILSON
A Professional Corporation
1000 G Street
Sacramento, California 95814
P.O. Box 13530
Sacramento, California 95853-4530
(916) 449-3800

[DATE STAMP]

Attorneys for Minor Plaintiff Leesa Bunch,
by and through her guardian ad litem, Terry Bunch

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM INTERNATIONAL, INC., formerly SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

No. 30534

ORDER ON PETITION FOR APPROVAL OF COMPROMISE OF A MINOR'S CLAIM

Date: May 29, 1998
Time: 1:30 p.m.
Place: 526 W Sycamore St
Willows, CA

GOOD CAUSE APPEARING THEREFORE, from the petition of Terry Bunch, IT IS HEREBY ORDERED as follows:

1. The settlement is in the best interest of the minor. Accordingly, said settlement is hereby APPROVED.

2. Petitioner is authorized to pay attorneys' fees and costs to Hardy Erich Brown & Wilson and to execute releases and dismissals in favor of the settling defendant upon payment of the agreed settlement amounts.

3. All net proceeds except as set forth below, shall be placed into the Leesa Bunch Special Needs Trust, which will soon be established at U.S. Bank in Sacramento, California. Until such time as that Special Needs Trust has been formed, the proceeds belonging to Leesa Bunch shall be set aside in a court-blocked account.

4. The accounting for the proceeds is APPROVED as follows:

Gross Settlement Amount:	$350,000.00
Less Costs:	29,030.00
Less 25% Atty Fee:	80,242 .50
Proceeds :	$240,727.50
50% to Leesa:	$120,363.75
50% to Medi-Cal:	$120,363.75

5. The disbursement of the settlement proceeds is APPROVED as follows:

1) To the Leesa Bunch Special Needs Trust or Courtblocked account: $120,363.75

1) To Hardy, Erich, Brown & Wilson: $109,272.50

2) To the Department of Health Services: $120,363.75

IT IS SO ORDERED.
Dated: 5/29/98

/s/
JUDGE OF THE SUPERIOR COURT

WHITNEY A. DAVIS, BAR # 149523
KAREN G. SHINE, BAR # 182928
HARDY ERICH BROWN & WILSON
A Professional Corporation
1000 G Street
Sacramento, California 95814
P.O. Box 13530
Sacramento, California 95853-4530
(916) 449-3800

[DATE STAMP]

Attorneys for Minor Plaintiff Leesa Bunch,
by and through her guardian ad litem, Terry Bunch

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM INTERNATIONAL, INC., formerly SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

No. 30534

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1) To Hardy, Erich, Brown & Wilson: $109,272.50

2) To the Department of Health Services: $120,363.75

IT IS SO ORDERED.
Dated: MAY 29 1998

/s/
JUDGE OF THE SUPERIOR COURT

CHARLES F. PREUSS (State Bar No. 45783)
THOMAS W. PULLIAM, JR. (State Bar No. 46322)
MEL. M. NEGUSSIE (State Bar No. 162501)
PREUSS WALKER & SHANAGHER LLP
595 Market Street
Sacramento, California 94105-2825
Telephone: (415) 978-2600
Facsimile: (415) 978-2613

[DATE STAMP]

Attorneys for Defendant
RANGER INDUSTRIES, INC. PRODUCT LIABILITY TRUST, sued herein as DOE 1

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM INTERNATIONAL, INC., formerly SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

No. 30534

[PROPOSED] ORDER DETERMINING GOOD FAITH SETTLEMENT [C.C.P. § 877.6(a)(2)]

The application of defendant RANGER INDUSTRIES, INC. PRODUCT LIABILITY TRUST (the "Trust"), dated June 5, 1998, for an order determining the

good faith of a settlement having been presented to this court;

IT APPEAFUNG TO THE SATISFACTION OF THE COURT THAT the said application is made pursuant to Code Civil Procedure § 877.6(a)(2); and that copies of the said Application, together with a Notice of Settlement and Declaration of Thomas W. Pulliam, Jr., and a copy of this Order were served by

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KAREN G. SHINE, BAR # 182928
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1000 G Street
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Sacramento, California 95853-4530
(916) 449-3800

[DATE STAMP]

Attorneys for Minor Plaintiff Leesa Bunch,
by and through her guardian ad litem, Terry Bunch

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her
guardian ad litem, TERRY BUNCH,
Plaintiff,

v. No. 30534

HASBRO, INC.; K MART CORPORATION;
MONTGOMERY WARD & COMPANY, INC.;
RANGER INDUSTRIES, INC. as successor-in-interest
to COLECO INDUSTRIES, INC.;
SLM INTERNATIONAL, INC., formerly SLM ACTION
SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

ORDER ON APPLICATION FOR
ENTRY OF DEFAULT AGAINST
DEFENDANT McMASKER

ENTERPRISES, INC., dba WATERWORKS UNLIMITED

ORDER ON REQUEST FOR ENTRY OF JUDGMENT AGAINST ONE, TRIAL AS TO OTHERS.

ORDER ON APPLICATION FOR ATTORNEY'S FEES AND COSTS;

Having reviewed the plaintiff's Notice of Application, Application, Declaration of Whitney A. Davis, Memorandum of Costs, and all supporting papers filed therewith and on file herein, this Court hereby finds as follows:

1) The plaintiff's Application for Entry of Default against defendant McMASKER ENTERPRISES, INC. dba WATERWORKS UNLIMITED is GRANTED;

2) The plaintiff's request to enter judgment as against one and allow the action to proceed against all remaining defendants, including unnamed Doe defendants, is GRANTED;

3) The plaintiff's Request for Attorney's Fees as against defendant McMASKER ENTERPRISES, INC. dba WATERWORKS UNLIMITED and in the amount of $550.00 is GRANTED;

4) The plaintiff's Request for Costs as defendant McMASKER ENTERPRISES, INC. dba WATERWORKS UNLIMITED and in the amount $607.90 is GRANTED.

IT IS SO ORDERED.

Dated: 8/6/98

/s/_____
JUDGE OF THE SUPERIOR COURT

JEFREY G. NEVIN, SB# 114295
DAVID M. MILLER, SB# 161152
PAUL JOHNSON, SB# 115817
NEVIN & HALL LLP
180 Grand Avenue, Suite 1380
Oakland, California 94612
Telephone: (510) 873-8600
Facsimile: (510) 873-8601

[DATE STAMP]

Attorneys for Defendant McMaster Enterprises, Inc., dba Waterworks Unlimited

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM INTERNATIONAL, INC., formerly SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

CASE No. 30534

NOTICE OF MOTION AND MOTION FOR RELIEF FROM DEFAULT JUDGMENT; MEMORANDUM OF POINTS AND

AUTHORITIES IN SUPPORT OF MOTION FOR RELIEF; DECLARATION OF SANFORD DANIEL COLBURN IN SUPPORT OF MOTION FOR RELIEF

Date: November 6, 1998
Time: 1:30 p.m.
Dept: TBA

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 6, 1998, at 1:30 p.m., in the above-captioned Court, defendant Waterworks Unlimited (Waterworks), will move this Court for an order for relief from the default judgment entered in favor of plaintiff and against Waterworks, and allow Waterworks to appear and fully participate in this action.

Waterworks seeks relief pursuant to *Code of Civil Procedure* section 473 based on mistake and excusable neglect in not responding to plaintiff's complaint, on the following grounds:

1. Plaintiff may not have adequately served Waterworks with the summons and complaint;

2. Waterworks erroneously believed that documents it received in relation to this case were related to another lawsuit, which was being defended by insurer-retained counsel. Waterworks did not understand that this was a different case, requiring it to contact its insurers and attorneys;

3. This motion is brought within the six-months of the entry of the default judgment.

This motion is based on this notice of motion and motion, the attached memorandum of points and authorities, the attached declaration of Sanford Daniel Colburn, and any further matters as the Court deems appropriate.

Dated: October 15, 1998 NEVIN & HALL LLP

By: /s/
Jeffrey G. Nevin, Esq.
Attorneys for Defendant
McMasker Enterprises, Inc.,
dba Waterworks Unlimited

JEFREY G. NEVIN, SB# 114295
DAVID M. MILLER, SB# 161152
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180 Grand Avenue, Suite 1380
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Telephone: (510) 873-8600
Facsimile: (510) 873-8601

[DATE STAMP]

Attorneys for Defendant McMaster Enterprises, Inc., dba Waterworks Unlimited

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

CASE No. 30534

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM INTERNATIONAL, INC., formerly SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

NOTICE OF SETTLEMENT AND APPLICATION FOR DETERMINATION OF GOOD FAITH SETTLEMENT BY DEFENDANT MCMASKER

ENTERPRISES, INC., DBA WATERWORKS UNLIMITED
[Code of Civ. Proc. § 877.6(a)(2)]

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendant MCMASKER ENTERPRISES dba WATERWORKS UNLIMITED has settled the claims of plaintiff LEESA BUNCH by and through her guardian ad litem, TERRY BUNCH by agreeing to pay the total sum of one million dollars ($1,000,000) in exchange for:

1. A release under and waiver of *Civil Code* section 1542 of all McMasker entities, predecessors, and successors, and anyone connected with McMasker Enterprises or Waterworks Unlimited including Dan Colburn, and any of his heirs, successors, or predecessors;

2. Plaintiff's agreement to release any past, present or future liens regarding her medical care or any other provider of services that she has or will require;

3. Plaintiff's stipulation that this agreement is in good faith;

4. Plaintiff's agreement not to sue or settle with Doughboy Enterprises, Hoffinger Industry, or

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DAVID M. MILLER, SB# 161152
NEVIN & HALL LLP
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Oakland, California 94612
Telephone: (510) 873-8600
Facsimile: (510) 873-8601

[DATE STAMP]

Attorneys for Cross-Complainant McMaster Enterprises, Inc.,dba Waterworks Unlimited

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

CASE No. 30534

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM INTERNATIONAL, INC., formerly SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED,
Cross-Complainant

v.

MONTGOMERY WARD & CO., INCORPORATED, HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL INC., GOLDEN WEST MARKETING, INC., and ROES 1through 100.

Cross-Defendants.

CROSS-COMPLAINT FOR IMPLIED EOUITABLE INDEMNITY COMPARATIVE INDEMNITY, EQUITABLE CONTRIBUTION, AND DECLARATORY RELIEF

WHITNEY A. DAVIS, BAR # 149523
KAREN G. SHINE, BAR # 182928
HARDY ERICH BROWN & WILSON
A Professional Corporation
1000 G Street
Sacramento, California 95814
P.O. Box 13530
Sacramento, California 95853-4530
(916) 449-3800

[DATE STAMP]

Attorneys for Minor Plaintiff LEESA BUNCH,
by and through her guardian ad litem, TERRY BUNCH

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM INTERNATIONAL, INC., formerly SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

No. 30534

PETITION FOR ORDER APPROVING COMPROMISE OF MINOR'S CLAIM

Date: November 19, 1999
Time: 2:30 p.m.
Place: 526 W Sycamore St
Willows, CA

Petitioner Terry Bunch alleges as follows:

1. Petitioner is the natural father of minor plaintiff Leesa Bunch (hereafter "Leesar"). This Court's Order on Petition for Appointment of Guardian ad Litem is attached hereto as Exhibit A.

2. Leesa was born on April 2, 1982, and will be 18 years of age on her next birthday.

3. On or about August 13, 1993, at a neighbor's house, Leesa suffered a spinal cord injury in a swimming incident involving an above-ground pool near Orland, California. Leesa is a C-3 Frankel Class A quadriplegic as a result of that injury. Plaintiff alleges that the injury was caused by a defect in the pool, its components, and the warnings therewith.

4. The defendants in this action include the Ranger Product Liability Trust (a successor to the bankrupt manufacturer known as Coleco), and Montgomery Ward, the retailer. Defendant McMasker Enterprises sold the replacement liner for the pool.

5. Plaintiff alleges causes of action based in strict products liability and negligence. Her total medical expenses incurred to date exceed $1 million. A true and correct copy of correspondence from the California State Department of Health Services ("DHS") so indicating is attached hereto as Exhibit B. Future medical expenses will exceed $500,000.

6. Plaintiff filed the initial complaint in this matter on May 15, 1997 in Glenn County Superior Court. On June 5, 1997, plaintiff amended the complaint to name Ranger Product Liability Trust and McMasker Enterprises. On June 13, 1997, defendant Montgomery Ward filed its notice

removing this case to federal court. Soon thereafter Montgomery Ward petitioned for bankruptcy under Chapter 13. On or about April 6, 1998, the U.S. District Court in and for the District of Northern California remanded this matter to Glenn County Superior Court. A true and correct copy of the Order remanding this matter is attached hereto as Exhibit C.

7. Prior to the referral of this case to plaintiff's counsel, plaintiff reached a settlement with the homeowners who owned the subject pool. The amount of that settlement was $300,000.

8. Plaintiff next settled with the Ranger Product Liability Trust for $350,000 in return for a release of all claims with prejudice against the trust. Plaintiff then settled with McMasker Enterprises in the amount of $1 million. The Court has previously entered orders approving the compromises of minor's claim for each of these settlements and later determined that the respective parties entered into each settlement in good faith. True and correct copies of the Orders Approving Minor's Compromise on all previous settlements are attached as Exhibits D through F.

9. All of the settlement proceeds were deposited into a court-blocked account pending the establishment of the Leesa Bunch Special Needs Trust. The Leesa Bunch Special Needs Trust has since been established. A copy of the Order approving the Special Needs Trust is attached as Exhibit G.

10. Medi-Cal has been reimbursed from the prior settlements pursuant to statute.

11. The current settlement provides that defendant Montgomery Ward will tender to plaintiff the amount of $328,800 in exchange for the execution of a general release.

This figure represents approximately $660,000 reduced by the bankruptcy court's fractional recovery system.

12. A Medi-Cal lien still exists in this case which totals $1,127,662.90, less the approximately $670,000 paid through prior settlements. A true and correct copy of the Medi-Cal lien statement is attached hereto as Exhibit H. DHS's reimbursement is limited to the total lien, less 25%. (Welf. & Inst. Code, § 14124.791.) When the settlement amount is less than the total amount of the lien, Medi-Cal is entitled to only 1/2 of any settlement proceeds, after deducting attorney fees and costs. (*Id.* at 14124.78.)

13. Petitioner has contracted for representation with the law firm of Hardy Erich Brown & Wilson, and for the payment of a 25% ccontingency attorneys' fee, after deducting reasonable costs of suit. As of the filing of this motion, unreimbursed costs total $1,409.44. A true and correct copy of the billings for present costs is attached hereto as Exhibit I. Petitioner respectfully requests that this Court approve the payment of said costs and the payment of the 25% contingency fee to the law firm of Hardy Erich Brown & Wilson, as calculated below.

14. Petitioner respectfully requests this Court render the following findings:

(A) That the settlement is in the best interest of the minor and approve said settlement and allocation of proceeds to costs and attorneys' fees on behalf of the minor, Leesa Bunch. Authorize the petitioner to pay attorneys' fees and costs to Hardy Erich Brown & Wilson and to execute releases and dismissals in favor of the settling defendant upon payment of the agreed settlement amounts. All net proceeds except as set forth below, shall be placed into the

Leesa Bunch Special Needs Trust, at U.S. Bank in Sacramento.

(B) Approve the accounting for the proceeds as follows:

Gross Settlement Amount:	$328,800.00
Less Costs:	$1,409.44
Less 25% Atty Fee:	$81,847.64
Proceeds:	$245,542.92
50% to Leesa:	$122,771.46
50% to DHS:	$122,771.46

(C) Approve disbursements as follows:

1) To Leesa Bunch Special Needs Trust:	$122,771.46
2) To Hardy, Erich, Brown & Wilson: (fees and costs)	$83,257.08
3) To DHS:	$122,771.46

Dated: October 1, 1999

Respectfully submitted,
HARDY ERICH BROWN & WILSON
A Professional Law Corporation

By /s/_____
for Whitney A. Davis
State Bar No. 149523

VERIFICATION OF PETITION FOR ORDER APPROVING COMPROMISE OF MINOR'S CLAIM

I, Terry Bunch, assert as follows:

I am the petitioner herein and the guardian for the minor plaintiff, Leesa Bunch. The matters contained in the foregoing document are true to the best of my own knowledge and understanding and I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed this 6th day of October, 1999 at Orland, California.

/s/_____
TERRY BUNCH

WHITNEY A. DAVIS, BAR # 149523
KAREN G. SHINE, BAR # 182928
HARDY ERICH BROWN & WILSON
A Professional Corporation
1000 G Street
Sacramento, California 95814
P.O. Box 13530
Sacramento, California 95853-4530
(916) 449-3800

[DATE STAMP]

Attorneys for Petitioner LEESA BUNCH,
by and through her guardian ad litem, Terry Bunch

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, a minor, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

v.

No. 30534
THIRD AMENDMENT TO COMPLAINT FOR DAMAGES

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM INTERNATIONAL, INC., formerly SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

Upon filing the complaint herein, plaintiff being ignorant of the true names of defendants, and having

designated said defendants in the complaint by fictitious names, to wit, Does 3, 4 and 5, and having discovered the true names of said defendants to be:

DOE 3:	Hoffinger Industries, Inc.
DOE 4:	Doughboy Recreational, Inc.
DOE 5:	Golden West Marketing, Inc.

hereby amends its complaint by substituting such true names in the place of and instead of such fictitious names wherever they appear in said complaint.

Dated: October 15, 1999

HARDY ERICH BROWN & WILSON
A Professional Law Corporation

By /s/_____
Whitney A. Davis
State Bar No. 14953

BUNCH v. HASBRO, et al.
Glenn County Superior Court Case No. 30534

PROOF OF SERVICE

CODE OF CIVIL PROCEDURE
SECTIONS 1013, SUBDIVISION (a) AND 2015.5

I am a citizen of the United States and am employed in the County of Sacramento. I am over the age of 18 years and not a party to the within cause; my business address is 1000 G Street, Sacramento, California 95814.

I am familiar with the business practice at my place of business for collection and processing of documents for mailing with the United States Postal Service. Documents so collected and processed, with postage fully prepaid, will be deposited with the United States Postal Service that same day in the ordinary course of business.

On October 26, 1999, I served the within THIRD AMENDMENT TO COMPLAINT FOR DAMAGES on the parties in this cause, by placing for collection, process and deposit a true copy thereof enclosed in a sealed envelope by:

____ United States mail by placing such envelope(s) in the designated area for collection and process of outgoing mail in accordance with this office's practice, whereby the mail is deposited in a United States mailbox, postage fully paid thereon, in the City of Sacramento, California, that same day in the ordinary course of business.

____ Air express courier,

____ Express Mail

XXXX Fax

____ Personal service

to the parties addressed as follows:

Bradley R. Larson, Esq.
Greve, Clifford, Wengel & Paras
980 Ninth Street
Sacramento, California 95814
Fax:No. (916) 441-7457

Jeffrey G. Nevin, Esq.
Nevin & Hall, LLP
180 Grand Avenue, Suite 950
Oakland, CA 94612
Fax No. (510) 873-8601

David H. Rush, Esq.
Peters, Rush, Habib & McKenna
P.O. Box 3509
Chico, CA 95927-3509
Fax No. (530) 342-4272

Norman S. Moss, Esq.
P.O. Box 593436
Orlando, FL 32859-3436
Fax No. (407) 888-2454

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 26, 1999, at Sacramento, California.

/s/
SHERRI PORTER

GREVE, CLIFFORD, WENGEL & PARAS, LLP
Bradley R. Larson, State Bar No. 095470
980 Ninth Street, Suite 1900
Post Office Box 2469
Sacramento, California 95812-2469
Telephone: (916) 443-2011
Facsimile: (916) 441-7457

Attorneys for Defendant
MONTGOMERY WARD & CO., INCORPORATED

[DATE STAMP]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF GLENN

LEESA BUNCH, etc.,
Plaintiff,

vs.

HASBRO, INC., et al.,
Defendants.

No. 30534
ORDER GRANTING MOTION FOR GOOD FAITH DETERMINATION
Date: November 19, 1999
Time: 2:30 p.m.
Dept.: TBA
Judge: Hon. Angus I. Saint-Evens

The motion of defendant MONTGOMERY WARD & CO., INCORPORATED, for a court determination as to the good faith of the settlement entered into between plaintiff Leesa Bunch, a minor, by and through her guardian ad litem Terry Bunch, and said defendant in the above-entitled action came on regularly for hearing by the court on November 19, 1999. Plaintiff appeared by counsel, Whitney Davis. Defendant appeared by counsel, Bradley R. Larson. No appearance was made by or on behalf of any other party.

Having considered the motion and its supporting papers, no opposition having been filed and for good cause shown, the court hereby

DETERMINES AND SO RULES THAT the settlement between plaintiff Leesa Bunch, a minor, by and through her guardian ad litem Terry Bunch, and defendant MONTGOMERY WARD & CO., INCORPORATED was made in good faith under the terms of C.C.P. § 877.6 with all protections and entitlements afforded thereby.

Dated: 11/19/99

/s/
HON. ANGUS I. SAINT-EVENS
JUDGE OF THE SUPERIOR COURT

ATTORNEY OR PARTY WITHOUT ATTORNEY
(*Name and Address*):
WHITNEY A. DAVIS, S.B. No. 149523
HARDY ERICH BROWN & WILSON
1000 G Street, Second Floor
Sacramento, California 95814

TELEPHONE NO.:
(916) 449-3800

ATTORNEY FOR (*Name*):
Leesa Bunch

Insert name of court and name of judicial district and branch court, if any:
Glenn County Superior Court

PLAINTIFF/PETITIONER:
Leesa Bunch, by and through her guardian ad litem, TERRY BUNCH

DEFENDANT/RESPONDENT:
RANGER INDUSTRIES, INC., et al.

NOTICE OF ENTRY OF DISMISSAL
AND PROOF OF SERVICE

☒ Personal Injury, Property Damage, or Wrongful Death

☐ Motor Vehicle ☒ Other

☐ Family Law

☐ Eminent Domain

☐ Other (*specify*):

FOR COURT USE ONLY
[DATE STAMP]

CASE NUMBER:
30534

TO ATTORNEYS AND PARTIES WITHOUT ATTORNEYS: A dismissal was entered in this action by the clerk as shown on the Request for Dismissal (*Attach a copy completed by the clerk.*)

Date: February 2, 2000

Whitney A. Davis ➤ /s/_____
(TYPE OR PRINT NAME OF ☒ ATTORNEY
☐ PARTY WITHOUT ATTORNEY)

PROOF OF SERVICE

1. I am over the age of 18 and not a party to this cause. I am a resident of or employed in the county where the mailing occurred. My residence or business address is:
1000 G Street, Second Floor,
Sacramento, California 95814

2. ☒ I served a copy of the Notice of Entry of Dismissal and Request for Dismissal by mailing them, in a sealed envelope with postage fully prepaid, as follows:

   a. ☐ I deposited the envelope with the United States Postal Service.

   b. ☒ I placed the envelope for collection and processing for mailing following this business's ordinary practice with which I am readily familiar. On the same day

correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

c. Date of deposit:
2/2/2000

d. Place of deposit (*city and state*):
Sacramento, CA

e. Addressed as follows (*name and address*):
Jeffrey Nevin, 180 Grand Ave, Suite 1380, Oakland, CA 94612; David Rush, P.O. Box 3509, Chico, CA 95927; Brad Larson, P.O. Box 2469, Sacramento, CA, 95812; Norm Moss, P.O. Box 593436, Orlando, FL 32859

3. ☐ I served a copy of the Notice of Entry of Dismissal and Request for Dismissal by personally delivering copies to the person served as shown below:
Name: Date: Time: Address:

4. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 2/2/00
SHERRI PORTER ➤/s/_____

Form Adopted by the Judicial Council of California
982(a)(5.1) [New January 1, 1997]

NOTICE OF ENTRY OF DISMISSAL
AND PROOF OF SERVICE

Code of Civil Procedure, § 581 et seq.
Cal. Rules of Court, rules 383, 1233

ATTORNEY OR PARTY WITHOUT ATTORNEY
(*Name and Address*):
Bradley R. Larson, 095
Greve, Clifford, Wengel & Paras LLP
980 Ninth Street, Suite 1900, POB 2469
Sacramento, California 95812-2469
(916) 443-2011 (916)441-7457

TELEPHONE NO.:
(916) 443-2011

ATTORNEY FOR (*Name*):
Defendant, Montgomery Ward & Co., Incorporated

Insert name of court and name of judicial district and branch court, if any:
Glenn County Superior Court

PLAINTIFF/PETITIONER:
Leesa Bunch, by and through her guardian ad litem, Terry Bunch

DEFENDANT/RESPONDENT:
Hasbro, Inc. et al.

REQUEST FOR DISMISSAL

☒ Personal Injury, Property Damage, or Wrongful Death
  ☐ Motor Vehicle ☒ Other
☐ Family Law
☐ Eminent Domain
☐ Other (*specify*):

FOR COURT USE ONLY
[DATE STAMP]

CASE NUMBER:
30534

A conformed copy will not be returned by the clerk unless a method of return is provided with the document.

1. TO THE CLERK: Please dismiss this action as follows:

a. (1) ☒ With prejudice (2) ☐ Without prejudice

b. (1) ☒ Complaint (2) ☐ Petition

(3) ☐ Cross-complaint filed by (*name*): on (*date*):

(4) ☐ Cross-complaint filed by (*name*): on (*date*):

(5) ☐ Entire action of all parties and all causes of action

(6) ☒ Other: (*specify*):*

As to defendant Montgomery Ward & Co., Incorporated only. Each party to bear their own fees and costs.

Date:

Whitney A. Davis
(TYPE OR PRINT NAME OF
☒ ATTORNEY
☐ PARTY WITHOUT ATTORNEY)

➤ /s/
(SIGNATURE)

* If dismissal requested is of specified parties only, of specified causes of action, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

Attorney or party without attorney for:
LEESA BUNCH

☒ Plaintiff/Petitioner

☐ Defendant/Respondent

☐ Cross-complainant

2. TO THE CLERK: Consent to the above dismissal is hereby given.**
Date:

➤_____

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY) (SIGNATURE)

** If a cross-complaint – or Response (Family Law) seeking affirmative relief – is on file, the attorney for the cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581(i) or (j).

(*To be completed by clerk*)

3. ☐ Dismissal entered as requested on (*date*):

4. ☐ Dismissal entered on (*date*): as to only (*name*):

5. ☐ Dismissal not entered as requested for the following reasons (*specify*):

6. ☐ a. Attorney or party without attorney notified on (*date*):
b. Attorney or party without attorney not notified. Filing party failed to provide ☐ a copy to conform ☐ means to return conformed copy

Date: Clerk, by_____, Deputy

Form Adopted by the Judicial Council of California
982(a)(5) [Rev. January 1, 1997]
Martin Dean's Essential Forms

REQUEST FOR DISMISSAL

Code of Civil Procedure, § 581 et seq.
Cal. Rules of Court, rules 383, 1233

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414 SALEM STREET - P.O Box 3509
CHICO, CALIFORNIA 95927-3509
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[DATE STAMP]

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NORMAN S. MOSS, ESQ.
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IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

CASE NO. 30534

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest

to COLECO INDUSTRIES, INC.; SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED,
Cross-Complainant,

v.

DEFENDANTS HOFFINGER INDUSTRIES, INC. dba DOUGHBOY RECREATIONAL, INC., and GOLDEN WEST MARKETING, INC.'S MOTION FOR SUMMARY JUDGMENT AND NOTICE THEREOF

Date: December 8, 2000
Time: 1:30 p.m.
Department: TBA
Trial Date: January 29, 2001

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IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

CASE NO. 30534

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest

to COLECO INDUSTRIES, INC.; SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED,
Cross-Complainant,

v.

MONTGOMERY WARD & COMPANY, INCORPORATED, HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a division of Hoffinger Industries, Inc. (sued herein as Doughboy Recreational, Inc.), GOLDEN WEST MARKETING, INC., and ROES 1 through 100,
Cross-Defendants,

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: December 8, 2000
Time: 1:30 p.m.
Department: TBA
Trial Date: January 29, 2001

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Attorneys for Defendants and Cross-Defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc.") & GOLDEN WEST MARKETING, INC.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

CASE NO. 30534

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,

Defendants.

McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED,
Cross-Complainant,

v.

MONTGOMERY WARD & COMPANY, INCORPORATED, HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a division of Hoffinger Industries, Inc. (sued herein as Doughboy Recreational, Inc.), GOLDEN WEST MARKETING, INC., and ROES 1 through 100,
Cross-Defendants,

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: December 8, 2000
Time: 1:30 p.m.
Department: TBA
Trial Date: January 29, 2001

I.

INTRODUCTION

This is an action for personal injuries sustained August 13, 1993, when the minor plaintiff, LEESA BUNCH, dived head first into a 4-foot deep aboveground swimming pool located at the Orland home of a neighbor, Joseph and Loretta Frank.

This motion for summary judgment is brought by defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries (sued herein as "Doughboy Recreational, Inc.") and GOLDEN WEST MARKETING, INC. as against plaintiff LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH. This summary judgment motion is also brought by the same parties, as cross-defendants, as against cross-complainant McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED.

The only involvement in the case by these moving parties is the allegation that the replacement liner on the Franks' pool at the time of the accident was manufactured by HOFFINGER's DOUGHBOY DIVISION and distributed to McMASKER, the retailer, through GOLDEN WEST MARKETING, INC.[1] Plaintiff has settled with the homeowners, Joseph and Loretta Frank ($300,000.00); the manufacturer of the original pool, Ranger Product Liability Trust, successor to Coleco Industries ($350,000.00); the retailer of the original pool, Montgomery Ward ($328,800.00); and the retailer of the replacement liner, McMasker Enterprises, dba Waterworks Unlimited ($1,000,000.00). It should be noted that the policy limits settlement on behalf of cross-complainant McMASKER arose from a total failure by McMASKER to respond to the summons and complaint, which resulted in a default judgment against it of approximately $19,000,000.00.

The salient facts can be summarized as follows:

---

[1]Though Doughboy has reserved the right to inspect the liner prior to trial to confirm that it is a Doughboy product, it is assumed to have been manufactured by Doughboy for purposes of this summary judgment motion.

On August 13, 1993, the 11-year-old plaintiff, LEESA BUNCH, voluntarily dived, headfirst, into an above-ground swimming pool while swimming at the home of a neighbor. Plaintiff, by her own admission, had been repeatedly cautioned, warned and told, many times prior to the accident, by her parents and the homeowners, not to dive into the pool, and had seen the numerous "no diving" signs and decals on many occasions prior to the date of the accident.

On the day of the accident, the homeowner, LORETTA FRANK, who was supervising the swimming children, had momentarily gone inside her residence when the accident occurred. When she returned, she was told by one of the children that Leesa had dived into the pool and was hurt, so she called 911 for emergency assistance. Plaintiff was rescued from the bottom of the pool, at least twice, on the date of the accident. On the first rescue attempt she was released back into the pool because the other children thought she was kidding. She was subsequently pulled from the pool a second time by two of the children, once they realized that something was in fact wrong with Leesa.

According to the deposition of the only credible eye witness to the accident, TYLER BREEDING, Leesa had dived into the pool at least once, earlier in the day, before the accident and had been sternly warned by Mrs. Frank, "Don't dive. It's shallow." About fifteen minutes later, and in Mrs. Frank's absence, Leesa climbed upon a wooden bench located on the deck next to the pool and did a nearly vertical dive, after which Tyler spotted her in a fetal position at the bottom of the pool.

ROBERT BREEDING, Tyler Breeding's father, and also the volunteer fireman who was first to respond to the

scene, was told by the homeowner, Loretta Frank, that Leesa had done a *"buttercup dive"* while holding her arms down at her sides.

As a result of the accident, Plaintiff suffered a severe fracture to her C-3 vertebra causing her to become quadriplegic and thereby suffer a projected lifetime disability.

II.

PLEADINGS

The plaintiff Bunch's complaint, as amended, names HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL, INC. and GOLDEN WEST MARKETING, INC. as Does 3, 4 and 5, respectively, and purports to state causes of action for products liability based on negligence, manufacturing defect, design defect, failure to warn and breach of warranty.

As there is absolutely no evidence in this action suggesting that there was anything defective in the physical manufacture, design or performance of the liner itself, this really boils down to a failure-to-warn case.

As for McMASKER's cross-complaint, which was filed on April 23, 1999, a full six months before BUNCH decided to join these defendants, it contains the standard allegations for implied equitable (comparative) indemnity.

These defendants answered the complaint and cross-complaint by denying the essential allegations thereof and alleging affirmative defenses based on comparative fault, third party fault, assumption of risk, alteration of product and misuse and abuse of product.

III.

BASIS FOR SUMMARY JUDGMENT

California Code of Civil Procedure § 437c(a) provides:

> Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit...

California Code of Civil Procedure § 437c(c) provides:

> The motion for summary judgment shall be granted if all the papers submitted show there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The purpose of the summary judgment procedure is to penetrate through evasive language and adept pleading and determine whether the parties actually possess evidence requiring the weighing procedures of a trial (*Chern v. Bank of America* [1976] 15 Cal.3d 866, 873), and to summarily determine whether the moving party is entitled to a judgment as a matter of law upon a finding that no triable issues of material fact exist. (*Miller v. Bechtel Corporation* [1983] 33 Cal.3d 868, 874).

IV.

DEFENDANTS OWE NO DUTY TO PLAINTIFF TO WARN OF OPEN AND OBVIOUS DANGER

The law has been long settled in California that a manufacturer has no duty to warn where the danger inherent in the product is obvious to the user. (*Barrett v. Atlas Powder Co.* [1978] 86 C.A.3d 560, 566.)

The manufacturer of a simple product has no duty to warn of the product's potentially dangerous conditions or characteristics that are readily apparent or visible upon casual inspection and reasonably expected to be recognized by the average user of ordinary intelligence. An above ground swimming pool is just such a simple product. As the court stated in *Glittenberg v. Doughboy Recreational Industries* (1992) 441 Mich. 379:

> there is no dispute that the aboveground pools are simple products. No one can mistake them for other than what they are, i.e. large containers of water that sit on the ground, all characteristics and features of which are readily apparent or easily discernible upon casual inspection. As Justice Griffin highlighted in *Glittenberg I, supra*, at 695-696: "[T]here is nothing deceiving about [their] appearance, nothing enigmatic about [their] properties. [They have] no mechanical devices, but rather [an] uncomplicated... product[s] with universally known characteristics."

The court continues:

> The obvious risk of this simple product is the danger of hitting the bottom. When such a risk is objectively determinable, warnings that parse the risk are not required. The general danger encompasses the risk of the specific

injury sustained. In other words, the risk of hitting the bottom encompasses the risk of catastrophic injury.

Most jurisdictions that have addressed similar matters have been unwilling to impose liability on the pool manufacturer. See *Neff v. Coleco Indusbies. Inc.* (D.Kan. 1991) 760 F.Supp. 864, 868, aff'd (10th Cir. 1992) 961 F.2d 220 (manufacturer had no duty to warn of open and obvious risk of diving headfirst into shallow swimming pool); *Griebler v. Doughboy Recreational, Inc.* (1991) 160 Wis.2d 547, 559-560 (diving headfirst into swimming pool of unknown depth is open and obvious danger that relieves manufacturer of duty to warn); *Glittenberg v. Doughboy Recreational Indus.* (1992) 441 Mich. 379, 384, 403 (manufacturer of simple product, such as aboveground swimming pool, under no duty to warn of obvious danger of diving into shallow water); *Lederman v. Pacific Industries* (N.D.Ill. 1996) 939 F.Supp. 619, 625, aff'd (7th Cir. 1997) 119 F.3d 551 (manufacturer of swimming pool under no duty to warn of danger of quadriplegia posed by diving into water of uncertain depth); *Winant v. Carefree Pools* (E.D.N.Y. 1989) 709 F.Supp. 57, 60-61 (because danger of diving into shallow end of swimming pool is obvious, failure to warn of danger not proximate cause of plaintiff's injuries).

Summary judgment in favor of the defendant has been based on a lack of a causal connection between the alleged negligent failure to warn and the plaintiff's injury. *Kelsey v. Muskin. Inc.*, 848 F.2d 39 (CA 2,1988); *Colosimo v. May Dep't Store Co.*, 466 F2d 1234 (CA 3, 1972); *McCormick v. Custom Pools Inc.*, 376 F.2d 471 (Minn. App 1985); *Vallillo v. Muskin Corp.* (1986) 514 A.2d 528; *Howard v. Poseidon Pools* (1988) 530 N.E.2d 1280; *Belling v. Haugh's Pools. Ltd.* (1987) 511 N.Y.S.2d 732.

In the instant case, we are dealing with a simple product, a shallow, aboveground swimming pool, the danger of diving headfirst into which is open and obvious. There is no duty to warn of such danger, and such can be decided by the court as a matter of law. (*Yakubowicz v. Paramount* [1989] 404 Mass. 624, 629.)

In addition to the foregoing, it should be noted that these defendants only produced a single component, a vinyl liner, which in and of itself poses no danger to anyone. Only when it was installed over the Coleco pool frame and filled with water did it become a potential hazard to those diving headfirst into it.

The law is quite clear that a manufacturer has no duty to warn of a possible defect in the product of another (*Garner v. Magic Chef. Inc.* [1981] 117 Cal.App.3d 634, 639); and that a manufacturer of a component part has no duty to warn of dangers inherent in the finished product itself. (*Powell v. Standard Brands Paint Co.* [1985] 166 Cal.App.3d 357, 362; *Wright v. Stang Manufacturing Co.* [1997] 54 Cal.App.4th 218.)

V.

THE WARNINGS PROVIDED IN DEFENDANTS' POOL LINER PACKAGE WERE ADEOUATE

According to the Franks, the subject liner was purchased in either the winter of 1988 or the spring of 1989. Defendants have produced copies of the pool liner package and included warnings which were provided in both 1988 and 1989.

The warnings contained therein were clear, complete and explicit and included the following:

1. The liner Information Package stated:

CAUTION. Above ground pools are designed for wading and swimming. Jumping or diving may cause severe injuries.

2. The installation instructions contained the following language:

Install safety labels on wall and liner... Do not MIS-USE the product by jumping or diving into the water. JUMPING OR DIVING IS MIS-USE! The product is designed for swimming or wading only!... If you dive into the water, you could hit your head on the bottom. If you do, you could be paralyzed permanently from the neck down for the rest of your life!... WE DON'T WANT THIS TO HAPPEN TO YOU. DON'T JUMP OR DIVE! Install the safety labels we have provided.

3. The 1998 safety labels, which were to be affixed to the liner, stated and depicted:

DO NOT JUMP! DO NOT DIVE! WATCH ALL KIDS!, and showed circled pictures (with slash marks through them) of divers breaking their necks and receiving other injuries.

4. The 1989 safety labels, which were to be affixed to the liner, stated and depicted:

DANGER. NO DIVING. NO JUMPING. CRIPPLING INJURY MAY RESULT, and showing a circled picture (with a slash mark through it) of a diver breaking his neck, as well as a picture of a person in a wheel chair.

These warnings very clearly outline the proscription against diving and spell out the consequences thereof.

It follows that, even if defendants did have a duty to warn (which defendants deny), they adequately complied with such duty by means of the materials supplied in the liner package.

VI.

PLAINTIFFS CANNOT PROVE CAUSATION SINCE DEFENDANTS' WARNINGS WERE NEVER PLACED ON THE POOL

The facts in the instant case indicate that the safety labels provided by defendants with the pool liner were never placed on the pool as required by defendants' installation instructions.

Mr. Frank testified that he did not add any warning signs or decals to the used pool which he obtained from Robert Royce in 1987. Whatever was on the pool when he got it in 1987 was on it at the time of the subject accident. He did not utilize the safety labels provided with the defendants' liner, as he did not believe any more were necessary.

When a manufacturer does not deal directly with the purchasers of its products, its warnings are sufficient if they are given to its distributor. (*Torres v. Xomox Corp.* [1996] 49 Cal.App.4th 1, 21.) Here, the safety warnings were provided not only to defendants' distributors, but to its retailer, McMasker, and its retailer's customer, Joseph Frank.

Mr. Frank substituted his judgment as to the appropriateness of the warnings for that of defendants and

physically intervened, thereby breaking the chain of causation.

VII.

THE WARNINGS ALREADY ON THE POOL, EVEN WITHOUT THOSE SUPPLIED BY DEFENDANTS, WERE ADEQUATE

The evidence establishes that there were numerous warnings not to dive located on and around the pool at the time of the subject accident.

There were decals on the top railing stating:

CAUTION. NO DIVING.

There were decals on the inside cap/walls of the pool stating:

CAUTION. NO DIVING. SHALLOW WATER.

There were two signs, one on each of two wooden rails near the ladder, each reading:

4 FT. DEEP. NO DIVING. NO JUMPING.

There was a ladder leading from the deck into the pool, each rung of which was stamped:

NO DIVING.

Leesa Bunch, Erick Bunch, Travis Breeding and Tyler Breeding all testified that they had seen these warnings at the pool, and understood that they were not to dive.

In addition, Leesa Bunch had been expressly warned verbally on numerous occasions not to dive by Loretta Frank, Joseph Frank and Bileta Bunch, including a warning by Loretta Frank on the very day of the accident.

Such warnings were adequate and preclude liability as to these defendants.

VIII.

DEFENDANTS ARE NOT LIABLE BECAUSE THEIR PRODUCT WAS ALTERED AND MISUSED AFTER IT LEFT THEIR HANDS

It is an essential element of plaintiff's proof in seeking recovery based on strict liability, that any defect in fact existed when the product left the possession of defendants. (*Moerer v. Ford Motor Co.* [1976] 57 Cal.App.3d 114, 116-117; *McCurter v. Norton Co.* [1968] 263 Cal.App.2d 403,410; *Erickson v. Sears. Roebuck & Co.* [1966] 240 Cal.App.2d 793, 798.)

In the instant case, defendants' product consisted of the pool and the associated instructions and safety labels. Joseph Frank, by deciding not to affix the safety labels to the liner pursuant to defendants' installation instructions, altered and misused the product, thereby precluding any liability on the part of defendants.

As a separate, and distinct defense, plaintiff herself misused defendants' product by diving into the pool in the face of numerous written and verbal warnings against doing so.

IX.

PLAINTIFF IS BARRED FROM RECOVERING AGAINST DEFENDANTS BASED ON THE DOCTRINE OF PRIMARY RISK

This is a primary assumption of risk case under the rationale of *Knight v. Jewett* (1992) 3 Cal.4th 296, and plaintiff is totally barred from recovering against defendants. In the *Knight* case, the court held that defendant, who injured plaintiff while playing touch football, was entitled to summary judgment under the "primary assumption of risk" doctrine because the defendant did not owe any legal duty to the plaintiff.

In subsequent cases, the courts have not limited the primary assumption of risk doctrine to contact sports or other sports where the defendant is an opponent. The doctrine has been applied to many "teamless" activities, such as sport fishing (*Mosca v. Lichtenwalter* [1997] 58 Cal.App.4th 551, 554); riding a horse (*Shelly v. Stepp* [1998] 62 Cal.App.4th 1288); figure skating (*Staten v. Superior Court* [1996] 45 Cal.App.4th 1628, 1638); and water tubing (*Record v. Reason* [1999] 73 Cal.App.4th 472, 482).

The *Record* court held that, for primary assumption of risk purposes,

> ...an activity falls within the meaning of "sport" if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.

In the instant case, when asked why she continued to dive, even though Mrs. Frank had told her not to, Leesa Bunch replied, "Because it was more fun." Leesa also stated that she made shallow dives from the deck so as not to injure herself by hitting the bottom. The actual dive that injured her was one where she climbed up on the wooden bench, which

was on the deck, and did a nearly vertical dive within about a foot of the pool's edge.

All of the ingredients of a primary assumption of risk sport are here: enjoyment – thrill – physical exertion – elements of skill – a challenge – potential risk of injury.

It is apparent that plaintiff is completely barred from recovering against these defendants based on the doctrine of primary assumption of risk.

X.

AS DEFENDANTS/CROSS-DEFENDANTS ARE NOT LIABLE TO PLAINTIFF, THEY ARE NOT LIABLE TO CROSS-COMPLAINANT

Since McMasker's cross-complaint is based on implied equitable (comparative) indemnity, it follows that it cannot recover from defendants/cross-defendants, since plaintiff cannot.

XI.

CONCLUSION

Based on the above reasons and authorities, the court is respectfully urged to grant this summary judgment as against plaintiff BUNCH and cross-complainant McMASKER.

Date: November 3, 2000

PETERS, RUSH, HABIB & McKENNA

/s/
DAVID H. RUSH
Attorneys for Defendants and Cross-Defendants

the pool, the Franks bought a new liner from Waterworks in Chico. This is the same liner that was in place at the time of the 1993 accident.

5. Sometime prior to the installation of the pool, the Franks bought a ladder which had two holders affixed to the deck. The rungs extended into the pool and rested on the pool bottom. Each of the ladder's rungs was clearly stamped "NO DIVING."

Joseph Frank deposition, p. 44, l. 14-26; p. 45, l. 1-2. Photos #1 and #2.

6. Joseph Frank designed and built a wood deck, which was originally 7 feet wide but had been expanded to 15 feet wide by the date of he accident.

Joseph Frank deposition, p. 36, l. 19 to p. 37, l. 14.

7. The pool as supplied to the Franks by Royce had decals on the top railings facing skyward and decals on the cap facing to the inside of the pool.

Joseph Frank deposition, p. 82, l. 26 to p. 83, l. 12.

8. Mr. Frank did not add any warning signs or decals to the pool. Whatever was on the pool when he got it was on the pool at the time of the subject accident. He did not believe any more were necesary.

Joseph Frank deposition, p. 46, l. 11-16; p. 47, l. 11-15.

9. The decals on the top railing stated, "CAUTION. NO DIVING," and the decals on the inside of the caps said, "CAUTION. NO DIVING. SHALLOW WATER," and

depicted a diver inside a circle with a slash mark through it to emphasize no diving.

Photos #3 and #4.

10. There were two signs, one on each of the two wooden rails that ran perpendicular to the pool near the ladder. These signs read, "4 FT. DEEP. NO DIVING. NO JUMPING."

Loretta Frank deposition, p. 33, l. 11 to p. 34, l. 10; p. 34, l. 15-18. Photo #5.

11. On August 19, 1993, plaintiff Leesa Bunch, age 11, and her brother, Erick Bunch, age 9, rode their bikes to the home of Joseph and Loretta Frank, at the invitation of Josh Frank, age 11.

Leesa Bunch deposition, p. 75, l. 14 to p. 76, l. 8.

12. The three young people were later joined by two others, Travis Breeding, age 10, and Tyler Breeding, age 11, at the Franks' home to go swimming.

Leesa Bunch deposition, p. 76, l. 10-11.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

[DATE STAMP]

LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH,
Plaintiff,

vs.

HASBRO, INC., et al.,
Defendants,

No. 30534

ORDER DENYING MOTION FOR SUMMARY JUDGMENT and ORDER DENYING MOTION FOR BIFURCATION OF ISSUES

And related cross action

The above entitled matter came before the court on January 4, 2001, on the motion of the defendants Hoffinger Industries, Inc. dba Doughboy Recreational Company (sued herein as Doughboy Recreational, Inc.) and Golden West Marketing, Inc., for a summary judgment, Joseph B. Harvey, Judge, presiding. The moving parties were represented by David H. Rush of Peters, Rush, Habib & McKenna; the plaintiff, Leesa Bunch, was represented by Whitney A. Davis of Charter Miller Davis LLP; and cross-complainant McMasker Enterprises, Inc., was represented by Jeffrey G. Nevin of Nevin Gruen, LLP.

After reading all of the parties' points and authorities, and after considering the oral arguments, the court orders that the motion for summary judgment be, and it is hereby, denied.

The court determines that there is a triable issue of fact as to the question whether the defendant discharged its

duty to provide a warning adequate to inform foreseeable users that diving into the pool created a risk of quadriplegia. The affidavit of Dr. Ralph L. Johnson in opposition to the motion for summary judgment and the evidence that the plaintiff was 11 years old at the time a the accident raise a question whether the "No Diving" warnings were adequate notice to an 11 year old child, and the court determines that a jury must decide that question.

Defendant also asserted that, as a matter of law, the plaintiff cannot recover because of the primary assumption of the risk doctrine involved with the sport of swimming and diving. But no case has been cited to the court that satisfies the court that a person engaging in a sport primarily assume the risk of injury resulting from a defectively manufactured product. Here, the question is whether the pool liner manufactured by the defendant was defective for failure to adequately warn foreseeable 11 year old users of the danger of quadriplegia that could result from diving.

The defendant also moved to bifurcate the issues of liability and damages. That motion is also denied for the reason that there is too much overlapping of evidence on the two issues, so that a bifurcation would result in too much duplication of evidence and court time.

Dated: Jan 31, 2001

/s/_____
Judge of the Superior Court

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TELEPHONE: (530) 342-3593
FAX: (530)342-4272

[DATE STAMP]

DAVID H. RUSH (State Bar No. 39362)

Attorneys for Defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc.") & GOLDEN WEST MARKETING, INC.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her Guardian ad Litem, TERRY BUNCH,
Plaintiff,

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

CASE NO. 30534

McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED,
Cross-Complainant,

v.

MONTGOMERY WARD & CO., INCORPORATED, HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a division of Hoffinger Industries, Inc. (sued herein as Doughboy Recreational, Inc.), GOLDEN WEST MARKETING, INC., and ROES 1 through 100,

Cross-Defendants,

DEFENDANTS HOFFINGER INDUSTRIES, INC., dba DOUGHBOY RECREATIONAL, INC., and GOLDEN WEST MARKETING, INC.'S NOTICE OF MOTION AND MOTION FOR DISMISSAL OF COMPLAINT

Date: June 8, 2001
Time: 1:30 p.m.
Dept.: TBA
Judge: Harvey
Trial Date: July 30, 2001

TO ALL PARTIES IN THE ABOVE-REFERENCED ACTION:

PLEASE TAKE NOTICE that on June 8, 2001, at 1:30 p.m., or as soon threreafter as the parties may be heard, counsel for defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as Doughboy Recreational, Inc.) and Golden West Marketing, Inc., shall appear before this court and move for order dismissing the complaint as to the moving defendants.

Defendants move for dismissal of the complaint on the ground that plaintiff has covenanted not to sue these moving defendants.

This motion will be based on the Memorandum of Points and Authorities and the supporting declaration of David H. Rush filed herewith.

Dated: May 11, 2001

PETERS, RUSH, HABIB & McKENNA

/s/
DAVID H. RUSH
Attorneys for Defendants and Cross-Defendants

PROOF OF SERVICE

I am a citizen of the United States and am a resident of the County of Butte. I am over the age of 18 years and not a party to the within action; my business address is 414 Salem Street, Chico, California 95928.

On this date, I served the foregoing document(s) described as:

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR DISMISSAL OF COMPLAINT; POINTS ANDAUTHORITIES IN SUPPORT THEREOF; DECLARATION OF DAVID H. RUSH IN SUPPORT THEREOF

on the parties below by placing a true copy thereof in a sealed envelope and served same on the parties\counsel, addressed as follows:

Jeffrey G. Nevin, Esq. Kelly C. Levy, Esq. Nevin Levy, LLP 45 Quail Court, Suite 300 Walnut Creek, CA 94596	Attorneys for Defendants and Cross-Complainant McMasker Enterprises, Inc.
Whitney A. Davis, Esq, Charter Miller Davis, LLP Post Office Box 15408 Sacramento, CA 95851	Attorneys for Plaintiff Leesa Bunch
Norman S. Moss, Esq. Attorney at Law Post Office Box 593436 Orlando, FL 32859-3436 Personal Service	Courtesy Copy

The following is the procedure in which service of this document was effected:

__X__ US. Postal Service (placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice whereby the mail is deposited in the U.S. mailbox in the City of Chico, California after the close of the day's business).

____ Personal Service

____ Facsimile

____ Federal Express

____ Express Mail

I declare under penalty of perjury that the foregoing is true and correct and that this document is executed at Chico, California, on May 11, 2001.

/s/
Sara Ellis

PETERS, RUSH, HABIB & McKENNA
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[DATE STAMP]

DAVID H. RUSH (State Bar No. 39362)

Attorneys for Defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc.") & GOLDEN WEST MARKETING, INC.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her Guardian ad Litem, TERRY BUNCH,
Plaintiff,

CASE NO. 30534

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED,

Cross-Complainant,

v.

MONTGOMERY WARD & CO., INCORPORATED, HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a division of Hoffinger Industries, Inc. (sued herein as Doughboy Recreational, Inc.), GOLDEN WEST MARKETING, INC., and ROES 1 through 100,

Cross-Defendants,

DECLARATION OF DAVID H. RUSH IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT

Date: June 8, 2001
Time: 1:30 p.m.
Dept.: TBA
Judge: Harvey
Trial Date: July 30, 2001

I, David H. Rush, declare:

1. I am an attorney of record for defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc.") and GOLDEN WEST MARKETING, INC.

2. On May 4, 2001, I reviewed the clerk's files with respect to the above-entitled matter for the time period preceding my entry into the case on July 16, 1999.

3. For the very first time I saw the transcript of the Settlement Hearing conducted before the Honorable Angus I. Saint-Evens. I then ordered a copy from the court reporter and have attached a true and correct copy thereof as Exhibit "A" to the Points and Authorities filed herewith.

4. I also discovered McMasker's Notice of Settlement and Application for Determination as well as Judge Saint-Evens' Order approving the settlement, copies of which are attached as Exhibits "B" and "C," respectively, to the Points and Authorities filed herewith.

5. If called as a witness, I could testify competently to the foregoing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 11th day of May, 2001, at Chico, California.

/s/
DAVID H. RUSH

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TELEPHONE: (530) 342-3593
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[DATE STAMP]

DAVID H. RUSH (State Bar No. 39362)

Attorneys for Defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc.") & GOLDEN WEST MARKETING, INC.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
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LEESA BUNCH, by and through her Guardian ad Litem, TERRY BUNCH,
Plaintiff,

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v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
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McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED,

Cross-Complainant,

v.

MONTGOMERY WARD & CO., INCORPORATED, HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a division of Hoffinger Industries, Inc. (sued herein as Doughboy Recreational, Inc.), GOLDEN WEST MARKETING, INC., and ROES 1 through 100,

Cross-Defendants,

DEFENDANTS HOFFINGER INDUSTRIES, INC. dba DOUGHBOY RECREATIONAL, INC., and GOLDEN WEST MARKETING, INC.'S POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Date: June 8, 2001
Time: 1:30 p.m.
Dept.: TBA
Judge: Harvey
Trial Date: July 30, 2001

I.

INTRODUCTION

This is an action for personal injuries sustained August 13, 1993, when the minor plaintiff, LEESA BUNCH, dived head first into a 3-1/2-foot deep aboveground swimming pool located at the Orland home of a neighbor, Joseph and Loretta Frank.

This motion for dismissal of the complaint is brought by defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries (sued herein as "Doughboy Recreational, Inc.") and GOLDEN WEST MARKETING, INC. as againts plaintiff LEESA BUNCH, by and through her guardian ad litem, TERRY BUNCH.

Prior to these defendants' entry into the case, plaintiff settled with the homeowners, Joseph and Loretta Frank ($300,000.00); the manufacturer of the original pool, Ranger Product Liability Trust, successor to Coleco Industries ($350,000.00); the retailer of the original pool, Montgomery Ward ($328,800.00); and the retailer of the replacement liner, McMasker Enterprises, dba Waterworks Unlimited ($1,000,000.00). It should be noted that the policy limits settlement on behalf of cross-complainant McMasker arose from a total failure by McMasker to respond to the summons and complaint, which resulted in a default judgment against it of approximately $19,000,000.00. The irony of the McMASKER settlement is that McMASKER was not originally sued by the plaintiff, but was brought in as a Doe defendant to defeat MONTGOMERY WARD's removal of the case to federal court based on diversity of citizenship.

After settling with the plaintiff, McMASKER filed on April 23, 1999 a cross-complaint for indemnity against DOUGHBOY, HOFFINGER and GOLDEN WEST MARKETING.

Over six months later, on November 1, 1999, plaintiff amended her complaint to name DOUGHBOY, HOFFINGER and GOLDEN WEST MARKETING as Doe defendants.

II.

DISCUSSION

On May 4, 2001, following the case management conference held before Judge Harvey in Willows, defendants' attorney, David H. Rush,. reviewed the early case files in the Glenn County Clerk's office and learned for the first time that plaintiff had named DOUGHBOY, HOFFINGER and GOLDEN WEST MARKETING as defendants in contravention of the express terms of plaintiff's settlement with McMASKER and the court order of Judge Saint-Evens approving same.

The clerk's files herein reveal that a settlement hearing was held January 13, 1999, before the Honorable Angus I. Saint-Evens. Defendants have now obtained a transcript of that hearing from the court reporter and a copy thereof is attached hereto as Exhibit "A".

Following an in chambers discussion, the parties put the details of the setllement "on the record." Among the terms of settlement set forth by Jeff Nevin, on behalf of McMASKER, and by Whitney Davis, on behalf of the plaintiff BUNCH, was the following at page 5, lines 2 through 7:

> Further, *Leesa Bunch, through counsel, covenants today not to sue or settle with Doughboy Enterprises, Hoffengerin [sic] Industry, or Golden West Marketing,* as those will be targets of a cross-complaint by McMasker and Waterworks, and that we will attempt to join in this action to prosecute those cross-complaints with the now pending action. (Emphasis added.)

On January 28, 1999, MCMASKER filed its Notice of Settlement and Application for Determination of Good Faith, a copy of which is attached hereto as Exhibit "B." Said notice provides that McMASKER will pay BUNCH One Million Dollars in exchange for:

> 1. A release under and waiver of *Civil Code* section 1542 of all McMasker entities, predecessors, and successors, and anyone connected with McMasker Entexprises or Waterworks Unlimited including Dan Colburn, and any of his heirs, successors, or predecessors;
>
> 2. Plaintiff's agreement to release any past, present or future liens regarding her medical care or any other provider of services that she has or will require;
>
> 3. Plaintiff's stipulation that this agreement is in good faith;
>
> 4. *Plaintiff's agreement not to sue or settle with Doughboy Enterprises, Hoffinger Industry, or Golden West Marketing.* (Emphasis added.)

On February 8, 1999, Judge Saint-Evens signed an Order approving the aforesaid settlement between McMASKER and BUNCH and finding it to be in good faith, a copy of which is attacha hereto as Exhibit "C."

III.

DISMISAL OF COMPLAINT REQUIRED

By naming DOUGHBOY, HOFFINGER and GOLDEN WEST MARKETING as Doe defendants and bringing them into her action, plaintiff broke her covenant not to sue, thereby breaching the court approved terms of settlement with McMASKER and summarily violating the court's order.

In order to restore the integrity of the McMASKER/BUNCH settlement agreement and to uphold the sanctity of this court's order approving the settlement, plaintiff's complaint must be dismissed as to these moving defendants.

IV.

CONCLUSION

Based on the above reasoning and authority, the court is respectfully requested to dismiss the complaint of BUNCH as to defendants DOUGHBOY, HOFFINGER and GOLDEN WEST MARKETING.

Dated: May 11, 2001

PETERS, RUSH, HABIB & McKENNA

/s/
DAVID H. RUSH
Attorneys for Defendants and Cross-Defendants

Exhibit "A"

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her
guardian ad litem, TERRY BUNCH,
Plaintiff,

v.

No. 30534
COPY

HASBRO, INC.; K MART CORPORATION;
MONTGOMERY WARD & COMPANY, INC.;
RANGER INDUSTRIES, INC as successor-in-interest
to COLECO INDUSTRIES, INC.;
SLM INTERNATIONAL, INC., formerly SLM ACTION
SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

Willows, CA; Glenn County; Wednesday, January 13, 1999
Before the Honorable ANGUS I. SAINT-EVENS, Judge.
Court called to order at approximately 10:30 a.m.
Mary J. Christensen, CSR #11549, Reporter Pro Tem

SETTLEMENT HEARING
COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES

For the Plaintiff:	HARDY, ERICH, BROWN & WILSON Attorneys at Law 1000 G Street, Second Floor Sacramento, CA 95814 (916) 449-3800 BY: WHITNEY A. DAVIS
For the Defendants: (McMasker Enterprises, and Waterworks)	NEVIN & HALL 180 Grand Avenue, Suite 950 Oakland, CA 94612 (510) 873-8600 BY: JEFFREY G. NEVIN
For the Defendant: (Montgomery Wards)	GREVE, CLIFFORD, WENGEL & PARAS Attorneys at Law 9809th Street, Suite 1900 Sacramento, CA 95814 (916) 443-2011 BY: BRADLEY R. LARSON

THE COURT: Case Number 30534, Leesa Bunch versus Hasbro and multiple others. We have Mr. Davis on behalf of the plaintiff who is the guardian ad litem. Mr. Bunch is present. We have Mr. Larson on behalf of Defendant Montgomery Ward. And, Mr. Nevin on behalf of McMasker Enterprises and Waterworks Unlimited.

MR. NEVIN: Mr. Colburn, the owner of Waterworks, is present.

THE COURT: We have had an in-chambers discussion relative to this matter,

MR. NEVIN: Yes, your.Honor.

THE COURT: And perhaps you would like to put on the record what has been resolved.

MR. NEVIN: Yes your Honor. Thank you.

After much discussion and negotiation over several months, we have finally reached an agreement to resolve this. As far as McMasker and Waterworks are concerned and the plaintiff directly, the terms of the settlement agreement are as follows:

McMasker, Waterworks will pay one million dollars to Leesa Bunch and her attorneys at the conclusion of the final closing papers, which we'll discuss in a moment.

In exchange, generally, for the one million dollar payment, Leesa Bunch, through her guardian, will provide the following:

First, a release under Civil Code Section 1542 of all McMasker entries, predecessors, and successors, and anyone connected with Waterworks including Dan Walburn, and any of his heirs, successors, or predecessors.

Second, the plaintiff will provide a full lien release of any liens past, present, or future as far as her medical care or any other provider of any services that she has or will receive in the future.

Third, a finding and a stipulation, and we can't make the finding today, but a stipulation from Leesa Bunch's counsel that he will stipulate that this settlement is in good faith. And I would like to obtain on the record a recommendation from Montgomery Wards' counsel now that he will recommend they not oppose such an application or finding.

MR. DAVIS: I am prepared to make that recommendation. Although, I have no authority to stipulation.

THE COURT; Thank you.

MR. NEVIN: Next, at the conclusion of today and the passing forth of documents, Mr. Davis, as counsel for Leesa Bunch, will cooperate with the preparation of documents that cause a lifting and a clearing of the both the default and the default judgment and will provide to us a dismissal with prejudice at the conclusion of a finding of good faith that will be brought shortly by our office and served on all parties for the provisions of 877.6.

Further, Leesa Bunch, through counsel, covenants today not to sue or settle with Doughboy Enterprises, Hoffengerin Industry, or Golden West Marketing, as those will be the targets of a cross-complaint by McMasker and Waterworks, and that we will attempt to join in this action to prosecute those cross-complaints with the now pending action. As soon as the judgement is expunged, I will prepare and Mr. Davis will later execute a reasonable and ordinary settlement of release of all claims agreement, which should be to him within a week.

We have today with us a petition for an order proving the compromise of this settlement, and I have reviewed it and would stipulate to its terms and conditions.

Other than that, those are the terms that are essential as far as the settling defendant is concerned.

THE COURT: Mr. Davis?

MR. DAVIS: Very little to add, your Honor, other than the counsel, Mr. Nevin, has authority from Farmers Insurance pay the one million dollar policy proceeds from the policy today. And I would like that on the record.

Mr. NEVIN: Of course I do.

MR. DAVIS: That the good faith motion that will be filed by Waterworks will be filed within 10 days of service of the order granting the minor's compromise. Funds are to be payable to Leesa Bunch and her attorneys Hardy, Erich, Brown, and Wilson within 15 days from granting of the good faith settlement.

Mr. NEVIN: Fair enough.

MR. DAVIS: And upon tender of the check, the default and default judgment, plaintiff will stipulate to set those aside. And those are the only conditions that plaintiff has.

Actually, just in one comment, medical. I've spoken with medical and their representative has faxed to me a lien release that medical executes on behalf of defendant in favor defendants who settle cases was medical recipients.

MR. NEVIN: I haven't seen a copy of that, your Honor. But, of course, we would like to retain a copy and review it and make sure it is satisfactory with the intent of

settle and that we pay no further money and the lien releases are all completely a matter between Leesa and her health care providers.

MR. DAVIS: The plaintiff concurs with that, and we'll make that happen.

THE COURT: Mr. Larson, you are essentially moot at this point in time.

MR. LARSON: And will remain so, your Honor.

MR. NEVIN: And, your Honor, one final thing. I would the the record to reflect that a settlement conference has been convened and that notice has been given to non parties Doughboy and Golden West and that the parties have not appeared and not responded and that I would like the Court to acknowledge on the record that this is a proceeding that is judicially supervised within the meaning of California Code of Civil Procedures Section 664 and that the settlement appears to be, on it's face, genuine and in good faith.

THE COURT: I think I can safely make that determination, and I will do so.

Mr. Nevin, notice has been given of this to the other parties?

MR. NEVIN: Yes. I forwarded a letter to their lawyer who has been communicating with us, invited them here, and gave them time, place, and manner of proceedings, and they have not contacted me.

THE COURT: As I stated, we started out with an in-chambers conference today. I was not sure how this matter got on calendar today. I don't have a copy of that letter in the Court's file. Would you provide a copy for the Court's file?

MR. NEVIN: I will.

THE COURT: If you like, you can give the copy to, a clerk and she can make the copy and return it to you. Madam clerk, if you'll make a copy and return the original ro Mr. Nevin.

MR, DAVIS: And plaintiff has not received any call from the defendants asking us to move the date or that they couldn't come or it was inconvenient.

THE COURT: And I am not aware that the Court has received any such call.

So, at this time then, counsel, I will give the Court's stamp of approval to your efforts at this point in time, subject to the filing of the actual motion for good faith determination and good faith settlement.

Okay. I also have a petition for order approving compromise of a minor's claim that was filed today by Mr. Davis. I have had a chance to look at that while Mr. Nevin was talking.

Mr. Davis, you may proceed on that, if you like.

MR. DAVIS: Yes, your Honor. Present in the courtroom is Mr. Terry Bunch.

If you stand and approach the microphone, sir.

He is the guardian ad litem.

Sir, you are the guardian ad litem for Ms. Bunch, are you not?

TERRY BUNCH: Yes.

THE COURT: Do you wish Mr. Bunch sworn?

MR. DAVIS: Yes.

THE COURT: Would you raise your right hand.

TERRY BUNCH,

called as a witness by the plaintiff, was sworn and testified as follows:

THE CLERK: You do solemnly swear that the testimony you shall give in the matter now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: I do

EXAMINATION BY MR. DAVIS

MR. DAVIS: Q. Sir, can you please state your name for the record?

A. Terry Bunch.

Q. And, sir, you are the natural father of Leesa Bunch?

A. Yes, I am.

Q. And the guardian for the purposes of this litigation?

A. Yes, I am.

Q. And do you have what you believe to be an understanding of the settlement proceedings that are taking place today?

A. Yes, I do.

Q. And you understand that Waterworks allegedly sold a replacement liner to the Frank's who owned the pool that Leesa was injured in?

A. Yes, I do.

Q. And you understand that their insurance company, Farmers, has tendered their policy limit to the amount of one million dollars to settle with Leesa today?

A. Yes, I do.

Q. And do you understand that once you settle with them and sign the release and take care of all the conditions that we've read into the record and that the Judge has basically approved the perimeters of that, you can't get any money from McMasker, Waterworks, or Farmers on this case again?

A. Yes.

Q. Do you have an understanding that these proceeds will be split with medical each fifty after attorneys fees and costs are taken out?

A. Yes.

Q. Did you approve a petition approving the minor's compliance today?

A. Yes, I did.

Q. And did you sign your verification to that?

A. Yes.

THE COURT: If I can interject for a moment, I will write in this that Mr. Bunch signed it on this date, the 13th day of January. It is not on my copy.

Mr. DAVIS: I didn't sign every copy, your Honor.

THE COURT: On the one I've got, which is the original, I have inserted the 13th.

MR. DAVIS: Thank you, very much.

Q. Is it your intent to settle for this amount?

A. Yes.

MR. DAVIS: Your Honor, have I missed anything?

THE COURT: The only thing that I need to have at this juncture is from you, Mr. Davis, and that is that you are satisfied that this settlement is appropriate and that the million dollars being tendered is the limit of the policy limits available by defendant, Waterworks.

MR. DAVIS: Yes, your Honor. I received the policy, or at least a regeneration of an old policy trom Mr. Nevin's office last week. I had an opportunity to review it and it does reflect a policy limit of one million dollars, and I am satisfied that that is all that can reasonably be settled for at this point in time due to the fact that Mr. Colburn, the owner of Waterworks are either in debt or judgment proof from that standpoint.

THE COURT: Any questions for this witness?

MR. NEVIN: I have none, your Honor.

THE COURT: Mr. Larson?

MR. LARSON: No, your Honor.

THE COURT: Thank you. I'll also receive your petition in evidence. I am prepared to grant the requested relief. Do you have a proposed order?

MR. DAVIS: I do, your Honor.

THE COURT: Hand it to the bailiff and I'll siqn it.

MR. DAVIS: Is there any way we can generate a minute order on that?

THE COURT: I'll allow you to prepare a written order and forward it to the court, Mr. Davis. I will approve the petition and compromise at this time, and I'll look forward to the formal order.

MR. DAVIS: Thank you, your Honor.

THE COURT: Do we need to set a further date now?

Mr. Davis, you are not privy with a conversation I had with Mr. Larson and Mr. Nevin. A matter which we talked about in chambers is that relative to his filing of his cross-complaint, the default judgment needs to be set aside before he can file that. Because, as I understood my quick research, he was without power to file a cross-complaint if there's been a judgment entered.

MR. NEVIN: That's correct.

MR. DAVIS: That's right, your Honor.

THE COURT: So we'll look forward to see all those documents come in.

MR. NEVIN: I would like the record to reflect that present today is Mr. Colburn and that Mr. Colburn has heard, understands, and agrees to, the terms that have been stated by counsel.

THE COURT: Is that right, Mr. Colburn?

MR. COLBURN: That is correct.

THE COURT: Thank you, sir.

We'll stand in recess. What I would like to do is set a further case management conference and trial setting conference for plaintiff and Montgomery Wards. Let's do that in April. How about April 9th conference call?

Mr. Davis, can I ask you to initiate that call, and the clerk can give you the number.

MR. DAVIS: Yes, your Honor.

THE COURT: April 9th at 2:00 o'clock.

MR. NEVIN: Does the Court usually request written CMC Statements before those?

THE COURT: Yes. Thank you.

MR. NEVIN: Thank you.

COURT REPORTER'S CERTIFICATE

This is to certify that I, MARY J. HIGGINBOTHAM, a Certified Shorthand Reporter of the State of California was present at the time and place the foregoing proceedings were had and taken in the within matter; and that as such shorthand reporter, I did take down in shorthand writing the aforementioned proceedings, and afterwards caused my said shorthand writing to be transcribed into typewriting; and the foregoing pages constitute a full, true and correct complete transcription of my said shorthand notes.

Pursuant to CCP 237, all reference to jurors by name has been redacted.

DATED: This 7th day of May, 2001.

/s/_____
MARY J. CHRISTENSEN, CSR
Certified Shorthand Reporter
California License #11549

Exhbit "B"

JEFFREY G. NEVIN, SB# 114295
DAVID M. MLLER, SB# 161152
NEVTN & HALL LLP
180 Grand Avenue, Suite 1380
Oakland, California 94612
Telephone: (510) 873-8600
Facsrmile: (510) 873-8601

Attorneys for Defendant McMasker Enterprises, Inc.,
dba Waterworks Unlimited

[DATE STAMP]

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, a Minor, by and through
her Guardian ad Litem, TERRY BUNCH,
Plaintiff, CASE NO. 30534

v.

HASBRO, INC.; K MART CORPORATION;
MONTGOMERY WARD & COMPANY, INC.;
RANGER INDUSTRIES, INC. as successor-in-interest
to COLECO INDUSTRIES, INC.;
SLM ACTION SPORTS, INC., and
DOES 1 through 25, inclusive,
Defendants.

NOTICE OF SETTLEMENT AND APPLICATION FOR DETERMINATION OF GOOD FAITH SETTLEMENT BY DEFENDANT MCMASKER

ENTERPRISES, INC., DBA WATERWORKS UNLMTED [Code of Civ. Proc. § 877.6(a)(2)]

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendant MCMASKER ENTERPRISES dba WATERWORKS UNLIMITED has settled the claims of plaintiff LEESA BUNCH by and through her guardian ad litem, TERRY BUNCH by agreeing to pay the total sum of one million dollars ($1,000,000) in exchange for:

1. A release under and waiver of *Civil Code* section 1542 of all McMasker entities, predecessors, and successors, and anyone connected with McMasker Enterprises or Waterworks Unlimited including Dan Colburn, and any of his heirs, successors, or predecessors;

2. Plaintiff's agreement to release any past, present or future liens regarding her medical care or any other provider of services that she has or will require;

3. Plaintiff's stipulation. that this agreement is in good faith;

4. Plaintiff's agreement not to sue or settle with Doughboy Enterprises, Hoffinger Industry, or Golden West Marketing.

Based on *Code of Civil Procedure* section 877.6(a)(2), this Notice of Settlement and Application For Determination of Good Faith Settlement and the Proposed Order are being served by Certified Mail Return Receipt Requested with the Proof of Service filed with the Court.

If no party files a motion within 25 days of the certified mailing of this Notice of Settlement and Application for Determination of Good Faith Settlement and Proposed Order, McMasker respectfully requests that the Court approve this settlement.

Dated: January 26, 1999 NEVIN & HALL LLP

By: /s/_____
Jeffrey G. Nevin, Esq.
Attorneys for Defendant
McMasker Enterprises, Inc.,
dba Waterworks Unlimited

Exhibit "C"

JEFFREY G. NEVIN, SB# 114295
DAVID M. MLLER, SB# 161152
NEVTN & HALL LLP
180 Grand Avenue, Suite 1380
Oakland, California 94612
Telephone: (510) 873-8600
Facsrmile: (510) 873-8601

Attorneys for Defendant McMasker Enterprises, Inc.,
dba Waterworks Unlimited

[DATE STAMP]

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, a Minor, by and through
her Guardian ad Litem, TERRY BUNCH,
Plaintiff, CASE NO. 30534

v.

HASBRO, INC.; K MART CORPORATION;
MONTGOMERY WARD & COMPANY, INC.;
RANGER INDUSTRIES, INC. as successor-in-interest
to COLECO INDUSTRIES, INC.;
SLM ACTION SPORTS, INC., and
DOES 1 through 25, inclusive,
Defendants.

ORDER RE: GOOD FAITH SETTLEMENT BY DEFENDANT MCMASKER ENTERPRISES, INC. DBA WATERWORKS UNLIMITED

[Code of Civ. Proc. § 877.6(a)(2)]

Defendant MCMASKER ENTERPRISES, INC., DBA WATERWORKS UNLIMITED having given notice of its settlement with plaintiff, LEESA BUNCH a Minor, by and through her Guardian ad Litem, TERRY BUNCH, with said Notice and Application and Proposed Order being served by Certified Mail, Return Receipt Requested, and 25 days having passed since the date of mailing of said Notice and authentication and Proposed Order, and no non-settling party having filed a notice of motion to contest the good faith nature of the settlement,

THIS COURT HEREBY APPROVES said settlement between defendant MCMASKER ENTERPRISES, INC., DBA WATERWORKS UNLIMITED and plaintiff, LEESA BUNCH a Minor, by and through her Guardian ad Litem, TERRY BUNCH, as being entered into and made in good faith.

Dated: 2/8/99 By: /s/_____
JUDGE OF THE SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

Leesa Bunch
Plaintiff/Petitioner

vs.

Hasbro, et al.
Defendant/Respondent

Case No: 97CV30534

REQUEST FOR SELECTION OF PROSPECTIVE TRIAL JURORS

SET FOR 30 days
Location: Willows/Orland

Jury trial set for July 30, 2001, at 9 a.m./p.m.
Attorneys: Whitney Davis, David Rush and Jeff Nevin
Number iof Jurors to be summoned 190, to arrive in increments of 50.
Disqualifications: DCB Ais Before Judge Harvey
Motions in limene is scheduled at Willows for 7/25/01 at 9 a.m.
Type of case: Personal injury
Jury fees paid by: Plaintiff
Interpreter: Yes No
Dated: May 11, 2001

/s/
Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH,
Plaintiff,

No. 97CV30534
MINUTE ORDER

v.

HASBRO, INC., et al.,
Defendants.

GOOD CAUSE APPEARING, the Court reschedules the hearing on Defendants Motion to Dismiss Complaint scheduled for June 8, 2001, to Monday, July 16, 2001, at 1:30 o'clock p.m., in the Glenn County Superior Court, 526 West Sycamore Street, Willows, California, before the Honorable Joseph B. Harvey.

Dated: May 16, 2001.

TINA M. BURKHART,
Court Executive Officer/Clerk

By: /s/
Stacy Kennon, Deputy Clerk

PROOF OF SERVICE

I declare that I am a citizen of the United States and employed in Glenn County, California. I am over the age of 18 years and not a party to the within action. My business address is 526 W. Sycamore Street, Willows, California 95988. On this date, I served the

MINUTE ORDER

(x) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail at Willows, California, addressed as set forth below:

Whitney A. Davis
Attorney at Law
1515 K Street, Suite 500
Sacramento, CA 95814

Jeffrey G. Nevin
Attorney at Law
45 Quail Court, Suite 300
Walnut Creek, CA 94596

David H. Rus.i
Attorney at Law
Post Office Box 3509
Chico, CA 95927

( ) By personally delivering a true copy thereof to the person at the address set forth below:

I, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 16, 2001, at Willows, California

/s/

Stacy Kennon, Legal Process Clerk

PETERS, RUSH, HABIB & MCKENNA
ATTORNEYS AT LAW
414 SALEM STREET - P.O. BOX3509
CHICO. CALIFORNIA 95927-3309
TELEPHONE: (530) 342-3593
FAX: (530) 342-4272

[DATE STAMP]

DAVID H. RUSH (State Bar No. 39362)

Attorneys for Defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc.") & GOLDEN WEST MARKETING, INC.

IN THE SUPERIOR COURT OF THE STATE OF CALLFORNIA IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her Guardian ad Litem, TERRY BUNCH,
Plaintiff,

CASE NO. 30534

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED,
Cross-Complainant,

v.

MONTGOMERY WARD & CO., INCORPORATED, HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a division of Hoffinger Industries, Inc. (sued herein as Doughboy Recreational, Inc.), GOLDEN WEST MARKETING, INC., and ROES 1 through 100,

Cross-Defendants,

DEFENDANTS HOFFINGER INDUSTRIES, INC. dba DOUGHBOY RECREATIONAL, INC., and GOLDEN WEST MARKETING, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT

Date: 7/16/01
Time: 1:30 p.m.
Dept.: TBA
Judge: Harvey
Trial Date: July 30, 2001

TO ALL PARTIES IN THE ABOVE-REFERENCED ACTION:

PLEASE TAKE NOTICE that on June 8, 2001, at 1:30 p.m., or as soon thereafter as the parties may be heard, counsel for defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as Doughboy Recreational, Inc.) and Golden West Marketing, Inc., shall appear before this court and move for order dismissing the complaint as to these moving defendants.

Defendants move for dismissal of the complaint on the ground that plaintiff has covenanted not to sue these moving defendants.

This motion will be based on the Memorandum of Points and Authorities and the supporting declaration of David H. Rush filed herewith.

Dated: May 11, 2001

PETERS, RUSH HABIB & MCKENNA

/s/

DAVID H. RUSH
Attorneys for Defendants and Cross-Defendants
DEFENDANTS

PROOF OF SERVICE

I am a citizen of the United States and am a resident of the County of Butte. I am over the age of 18 years and not a party to the within action; my business address is 414 Salem Street, Chico: California 95928.

On this date, I served the foregoing document(s) described as:

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR DISMISSAL OF COMPLAINT; POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF DAVID H. RUSH IN SUPPORT THEREOF

on the parties below by placing a true copy thereof in a sealed envelope and served same on the parties\counsel, addressed as follows:

Jeffrey G. Nevin, Esq. Kelly C. Levy, Esq. N evin Levy, LLP 45 Quail Court, Suite 300 Walnut Creek, CA 94596	Attorneys for Defendants and Cross-Complainant McMasker Enterprises, Inc.
Whitney A. Davis Charter Miller Davis LLP Post Office Box 15408 Sacramento, CA 95851	Attorneys for Plaintiff Leesa Bunch
Norman S. Moss< Esq. Attorney at Law Post Office Box 593436 Orlando, FL 32859-3436	Courtesy Copy

The following is the procedure in which service of this document was effected:

X U.S. Postal Service (placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice, whereby the mail is deposited in the U.S. mailbox in the City of Chico, California, after the close of the day's business).

Personal Service
Facsimile
Federal Express
Express Mail

I declare under penalty of perjury that the foregoing is true and correct and that this document is executed at Chico, California, on May 11, 2001.

GLENN COUNTY SUPERIOR COURT
GENERAL JURISDICTION, CIVI

DATE: 7-16-01 TIME: 1:30 P.M.
JUDGE Joseph Harvey
CLERK STACY KENNON CASE # 97CV30534
BAILIFF
REPORTER NONE PRESENT

APPEARANCES
PLAINTIFF Leesa Bunch
REPRESENTED BY: Whitney Davis

DEFENDANT Hasbro Inc.
REPRESENTED BY David Rush

DEFENDANT McMasker Enterprises
REPRESENTED BY Jeff Nevin

TYPE OF HEARING: Motion to Dismiss

Court sets forth tentative decision citing cases and Civil Code. Rush status there is time limitation and time has expired. Davis questions minor's compromise.

Court denies Motion. Court's Approval of prior settlement is vacated.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF GLENN

DATE: JULY 30, 2001 COURT MET AT: 8:30 A.M. PRESENT HON. JOSEPH HARVEY, STACY KENNON, DEPUTY CLERK, M. CHRISTENSEN, REPORTER, RACHEL DUCKETT, BAILIFF.

Title:

LEESA BUNCH, et al.,
Plaintiffs

APPEARANCES NOTED BELOW

vs.

HASBRI, INC., et al.,
Defendants.

MCMASTER ENTERPRISES, INC.
Cross-Complainant

vs.

MONTGOMERY WARD & CO.,
Cross-Defendants.

NATURE OF PROCEEDINGS:

JURY TRIAL in the above-entitled action comes before the Court for hearing at this time. Whitney Davis, attorney for and with Plaintiff, with his associate, Robert Osmundson, David Rush, attorney for and with Defendants, and Jeffrey Nevin, attorney for Cross-Complainant, are present.

DAY 1 - JULY 30,2001:

First set of 40 prospective jurors are called at 9:25 a.m. Court states names of all parties, counsel and witnesses involved in this trial, gives summation of case, and directs prospective jurors to complete Juror Questionnaire. Court directs jurors to return the following day at 9:00 a.m. Second set of 30 prospective jurors are called at 10:35 a.m. Court states names of all parties, counsel and witnesses in the case, gives summation, and directs completion of Juror Questionnaire.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF THE COUNTY OF GLENN

LEESA BUNCH,
Plaintiff, Case No. 30534

Vs.

HOFFINGER INDUSTRIES, INC.,
dba DOUGHBOY RECREATIONAL
COMPANY, And GOLDEN WEST
MARKETING, INC.,
Defendants. JUDGMENT

McMASKER ENTERPRISES, INC.,
dba WATERWORKS UNLIMITED,
Cross-complainant,

vs.

HOFFINGER INDUSTRIES, INC.,
dba DOUGHBOY RECREATIONAL
COMPANY, And GOLDEN WEST MARKETING, INC.,
Cross-defendants.

A special verdict having been rendered by the jury in the above entitled matter, the court having reserved preparation of the judgment upon such special verdict, and the parties having been heard on the terms of the judgment to be entered on such special verdict,

IT IS HEREBY ORDERED AND ADJUDGED that

Plaintiff LEESA BUNCH shall have judgment against the defendants HOFFINGER INDUSTRIES, NC., dba DOUGHBOY RECREATIONAL COMPANY, and GOLDEN WEST MARKETING, INC., in the amount of $12,526,890.70 plus costs in the amount of $_____.

Cross-complainant McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED, shall have judgment against the defendants HOFFINGER INDUSTRIES, INC., dba DOUGHBOY RECREATIONAL COMPANY, and GOLDEN WEST MARKETING, INC., in the amount of $1,000,000.00 plus costs in the amount of _____$

Dated: August 23, 2001

/s/
Judge of the Superior Court

PETERS, RUSH, HABIB & MCKENNA
ATTORNEYS AT LAW
414 SALEM STREET - P.O. BOX3509
CHICO. CALIFORNIA 95927-3309
TELEPHONE: (530) 342-3593
FAX: (530) 342-4272

[DATE STAMP]

DAVID H. RUSH (State Bar No. 39362)

Attorneys for Defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc.") & GOLDEN WEST MARKETING, INC.

IN THE SUPERIOR COURT OF THE STATE OF CALLFORNIA IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her Guardian ad Litem, TERRY BUNCH,
Plaintiff,

CASE NO. 30534

v.

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL

HASBRO, INC. et al.,,
Defendants.

AND RELATED CROSS ACTION

TO PLAINTIFF LEESA BUNCH AND TO CROSS-COMPLAINANT McMASKER ENTERPRISES, INC. AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that Defendants and Cross-Defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc. ") and GOLDEN WEST MARKETING, INC., intend to move this court, at a time to be set by the court, to vacate and set aside the verdict of the jury rendered in favor of plaintiff LEESA BUNCH and cross-complainant McMASKER ENTERPRISES, INC., and against Defendants and Cross-Defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc. ") and GOLDEN WEST MARKETING, INC., and the judgment entered on that verdict and to grant these moving defendants a new trial on all of the issues. The motion will be made on the following grounds:

1. Irregularity in the proceedings of the jury prevented defendants from having a fair trial.

2. An order of the court prevented defendants from having a fair trial.

3. There was misconduct of the jury.

4. Excessive damages appear to have been awarded.

5. The evidence is insufficient to justify the verdict.

6. There was an error in law, occurring at trial and excepted to by the moving party.

With respect to the grounds specified in Paragraphs 1, 2 and 3, above, this motion will be made on declarations.

With respect to the grounds specified in Paragraphs 4, 5 and 6, above, this motion will be made on the minutes of the court.

This motion is also based on a memorandum of points and authorities to be served and filed hereafter.

Dated: September 6, 2001

PETERS, RUSH, HABIB & MCKENNA

/s/

DAVID H. RUSH
Attorneys for Defendant Cross-Defendants

PROOF OF SERVICE

I am a citizen of the United States and am a resident of the County of Butte. I am over the age of 18 years and not a party to the within action; my business address is 414 Salem Street, Chico, California 95928.

On this date, I served the foregoing documentts) described as:

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL

on the parties below by placing a true copy thereof in a sealed envelope and served same on the parties\counsel, addressed as follows:

Jeffrey G. Nevin, Esq. Kelly C. Levy, Esq. Nevin Levy, LLP 45 Quail Court, Suite 300 Walnut Creek, CA 94596	Attorneys for Defendants and Cross- Complainant McMasker Enterprises, Inc.
Whitney A. Davis, Esq. Charter Miller Davis, LLP Post Office Box 15408 Sacramento, CA 95851	Attorneys for Plaintiff Leesa Bunch

The following is the procedure in which service of this document was effected:

X U.S. Postal Service (placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice, whereby the mail is deposited in the U.S. mailbox in the City of Chico, California, after the close of the day's business).

Personal Service

X Facsimile
Federal Express
Express Mail

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document is executed at Chico, California, on September 6, 2001.

/s/
Sara Ellis

PETERS, RUSH, HABIB & MCKENNA
ATTORNEYS AT LAW
414 SALEM STREET - P.O. BOX3509
CHICO. CALIFORNIA 95927-3309
TELEPHONE: (530) 342-3593
FAX: (530) 342-4272

[DATE STAMP]

DAVID H. RUSH (State Bar No. 39362)

Attorneys for Defendants Hoffinger Industries, Inc., Doughboy Recreational Company, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc.") & Golden West Marketing, Inc.

IN THE SUPERIOR COURT OF THE STATE OF CALLFORNIA IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her Guardian ad Litem, TERRY BUNCH,
Plaintiff,

CASE NO. 30534

v.

DEFENDANTS' POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL

HASBRO, INC. et al.,,
Defendants.

AND RELATED CROSS ACTION

INTRODUCTION

This action for personal injuries by plaintiff LEESA BUNCH and for indemnity by cross-complainant McMASKER ENTERPRISES, INC. was tried by jury on

July 30, 31, August 1, 2, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21 and 22, 2001, the Honorable Joseph B. Harvey, judge presiding. A special verdict in favor of plaintiff and cross-complainant was rendered on August 22, 2001, and judgment in favor of plaintiff and against defendants in the amount of $12,526,890.70, together with judgment in favor of cross-complainant and against cross-defendants in the amount of $1,000,000.00, were entered on August 23, 2001.

Defendants filed their Notice of Intention to Move for New Trial on September 6, 2001. These points and authorities are in support of defendants' motion for new trial.

II.

A NEW TRIAL SHOULD BE GRANTED BASED ON INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT

Code of Civil Procedure § 657(6) provides that a new trial may be granted based on: "Insufficiency of the evidence to justify the verdict. . . . "

In a jury trial a party, in effect, has two hearings, one before the jury and the other before the court sitting as a "thirteenth juror. " (*Norden v. Hartman* [19521 111 Cal.App.2d 751, 758.)

The court in *Candido v. Huitt* (1984) 151 Cal.App.3d 918, at page 923, states:

> In weighing and evaluating the evidence, the court is a trier-of fact and is not bound by factual resolutions made by the jury. The court may grant a new trial even though there be sufficient evidence to sustain the jury's verdict on appeal,

so long as the court determines the weight of the evidence is against the verdict.

Code of Civil Procedure § 657 makes it clear that the court may grant a new trial upon the ground of insufficiency of the evidence to justify the verdict if, "after weighing the evidence the court is convinced, from the entire record, including reasonable inferences therefrom, that . . . the jury clearly should have reached a different verdict . . . ." (Emphasis added.) Thus, the court is expected to reweigh the evidence, draw reasonable inferences therefrom, and determine whether the jury should clearly have reached a different verdict.

A. THE JURY SHOULD HAVE FOUND THAT THERE WAS NO DEFECT IN DESIGN NOR FAILURE TO WARN

The jury's special finding of defect was by the narrowest of margins, i.e., 9 to 3. This fact alone suggests that there was considerable evidence negating plaintiffs allegation of product defect. In fact, the evidence in that regard was so compelling that a new trial should be granted on the issue of product defect.

Plaintiffs entire case rested on the proposition that defendants' warning labels should have been affixed to the liner at the factory. Yet, the evidence was overwhelming that such was entirely impractical and infeasible. The clear weight of the evidence, based on testimony from both plaintiffs and defendants' expert witnesses, supported the proposition that, to be effective, the labels needed to be displayed in the "freeboard," that 6-inch space above the water line and below the top railing. Testimony of Danny Cargile, together with a photographic analysis of the liner which was in place on the Frank's pool at the time of the subject incident (Defendants' Exhibits V through BB), aptly

demonstrated that it is impossible to predict ahead of time where the warning label will end up on the pool if it is pre-affixed at the factory. The many unknown variables at work were pointed out, including varying frame sizes being fitted, varying depths of the pools, varying compaction and bottom materials at each pool, varying weather conditions (including temperature, humidity, sun or shade, etc.), varying quantity and speed of fill water being used and varying entry and exit points from one pool to another. Only after all the variables are removed can the warning labels be properly placed, and that cannot occur until the liner is in place and the pool has actually been filled with water.

The defendants' liner package contained explicit written directions advising the installer/homeowner to refer to the decal placement diagram and "MOUNT DECALS WITH BOTTOM EDGE 4" BELOW THE TOP RAIL." (Defendants' Exhibit A.) These same materials stated that, "Placement of 'DANGER' decals on liner is mandatory." Further, the materials provided that failure to follow those instructions would void the warranty.

It is significant that plaintiff was unable to produce one single example of a manufacturer, from among the 300+ liner manufacturers in America, who affixed its warning decals to the liner at the factory. In contrast, defendants produced actual liner packages from four of the country's largest liner manufacturers and established that in 2001, some 13 years after defendants' manufacture of its liner, the liner instructions are still directing the installer/owner to install the liner, fill the pool with water, and then affix the decals to the liner above the water line. (Defendants' Exhibits PP through SS.)

The court should reweigh this evidence, draw reasonable inferences therefrom, and conclude that the jury clearly should have found there was no defect in defendants' product.

B. THE JURY SHOULD HAVE ALLOCATED A SIGNIFICANT PERCENTAGE OF FAULT TO THE PLAINTIFF

In its response to Question Nos. 5 and 6, the jury determined that the plaintiff was contributorily negligent and that such negligence contributed as a cause to her injuries. Yet, in assigning a percentage to such contributory negligence of the plaintiff, the jury assigned only a paltry 5%. Such is clearly at odds with the evidence.

Testimony of the plaintiff and her mother, Bileta Bunch, established that plaintiff had her first swimming lesson at the age of two. Both of plaintiff's parents were athletic coaches at school; and, by the time of the subject accident, the plaintiff had become very proficient in gymnastics, swimming, track and softball. Plaintiff had two weeks of swimming lessons at the Orland pool in 1991 or 1992. Those who dive in the shallow end of the Orland pool are kicked out. In addition to Orland, plaintiff had swum in a friend's pool in Willows, as well as the pools of the Ogles, Breedings, Sousas and Franks in Orland, all of which plaintiff knew had rules against diving. Bileta Bunch had a detailed conversation with plaintiff just a week before the subject accident during which Mrs. Bunch told plaintiff that she was not to dive in the Franks' pool. Mrs. Bunch admitted that she knew that the no diving rule was "for safety reasons" and to prevent "head injuries, spinal cord injuries, broken bones."

Plaintiff testified that she had been warned not to dive by Renee Breeding at the Breeding's aboveground pool. She further testified that she had been swimming in the Franks' aboveground pool 4 or 5 times in 1992 and 8 to 9 times in 1993. Loretta Frank testified that she regularly told plaintiff and the other kids that there would be no diving in her pool. Mrs. Frank, who admitted that she knew the kids could break their necks diving into her pool, further testified

that, on the very day of the accident, she took the plaintiff and her brother, Erick, by the hand, led them to the edge of the pool and said, "No diving. It's too shallow. You could hurt yourself."

Plaintiff admitted that, prior to her dive, she had seen the labels on the inside of the poo railings which .read, "CAUTION. NO DIVING. SHALLOW WATER" and featured an international diving symbol with a slash through it, as well as stickers on the top side of the railings reading, "CAUTION. NO DIVING OR JUMPING." She was also aware of the large, raised "NO DIVING" writings embossed on each rail of the ladder which provided entry access to the pool.

The plaintiff, who was described by her father as a highly competitive athlete who always tried to outdo the boys, testified that the "no" in "NO DIVING" meant "don't get caught." She testified that she intentionally did "shallow" dives so as not to hun herself. She admitted that a steeper dive was incorrect because "then you go straight to the bottom."

The testimony of the only eyewitness, Tyler Breeding, coupled with the nature of the injury, which required a force from the back of the head pushing forward, attest to the fact that plaintiff failed to make a shallow dive and thus rendered herself quadriplegic.

The evidence of contributory negligence in this case is overwhelming, and the finding of only 5% contributory negligence by the jury is clearly contrary to the weight of the evidence. Contributory negligence of 75 % to 100% should have been assigned to the plaintiff.

III.
A NEW TRIAL SHOULD BE GRANTED BASED ON AN ERROR IN LAW

Code of Civil Procedure § 657(7) provides that a new trial may be granted based on: "Error in law, occurring at the trial and excepted to by the party making the application."

A. THE COURT ERRED IN PRECLUDING DEFENDANTS FROM ASKING MR. FRANK WHY HE FAILED TO AFFIX THE WARNING LABELS TO THE LINER IN ACCORDANCE WITH DEFENDANTS' WRITTEN INSTRUCTIONS

During the testimony of Joseph Frank, the homeowner in whose pool plaintiff dived, defendants asked him why he had failed to affix the warning labels to the liner in accordance with defendants' written instructions. Plaintiff objected that it called for an expert opinion, and the court sustained the objection and disallowed the question. Defendants provided the court with an offer of proof that Mr. Frank would have answered by saying that he chose not to affix defendants' labels as there were already warning labels elsewhere on the pool and he did not believe any more were necessary. This testimony was not offered to prove that the existing labels were adequate, but rather to show that Mr. Frank substituted his judgment for that of the defendants and thereby interrupted any causative connection between defendants' product and plaintiff's injury. The testimony, additionally, was relevant to the issue of plaintiffs contributory negligence as it corroborated the testimony of other witnesses as to the number and nature of the warnings that were already on the pool.

Such erroneous ruling prejudiced defendants' ability to present its defenses to the jury.

B. THE COURT ERRED IN PRECLUDING DEFENDANTS FROM INTRODUCING EVIDENCE THAT CROSS-COMPLAINANT HAD ALLOWED A

SIZEABLE DEFAULT JUDGMENT TO BE ENTERED AGAINST IT

Cross-complainant McMasker, in opening statement and throughout the trial, tried to paint defendants as cold-hearted, money hungry manufacturers who could care less about their retail dealers and the ultimate consumers of their products. Over defendants' objections, the court allowed portions of letters from defendants' counsel rejecting cross-complainant's tender of defense to be read to the jury, while the references therein to cross-complainant's default judgment were redacted. This allowed cross-complainant to introduce these inflammatory statements totally out of context and thereby agitate and bias the jury against the defendants.

For example, the court allowed McMasker to introduce into evidence the November 10, 1998 letter response of defendants' attorney, Norman Moss, to McMasker's tender of defense, which contained the statement, "happy hunting." (McMasker's Exhibit 16.) This comment was dramatically emphasized by McMasker's attorney in opening statement, in his direct testimony concerning McMasker's tender to defendants and settlement with plaintiff, and in closing argument, all with the obvious purpose of making the jury think that defendants were callous and uncaring manufacturers of pool liners. The court's error was in redacting from such letter Mr. Moss' reference to the default judgment which McMasker had allowed to be taken against it, thereby removing the overall context which would otherwise have put the "happy hunting" language into perspective.

In addition to the foregoing, the court's ruling which prevented defendants from mentioning the multi-million dollar default judgment against McMasker, precluded defendants from arguing that McMasker's carrier threw in its one million dollar policy in order to get its insured released

from the much larger default judgment, and not because of any real belief that its insured would otherwise I have been liable to the plaintiff. This ruling thereby enabled McMasker to put on its attorney expert, who testified that the settlement was reasonable based on the merits of plaintiff's case, without being cross-examined on the real motive behind the one million dollar settlement, i.e., the elimination of the huge default judgment against its insured.

It is obvious that the testimony of McMasker's expert as to liability, free from cross-examination on the real issue, adversely colored the jury's assessment as to defendants' liability, all to the prejudice of defendants.

C. THE COURT ERRED IN REJECTING DEFENDANTS' PROFFERED FAILURE TO WARN INSTRUCTION BASED ON BAJI 9.00.7 AND SUBSTITUTING INSTEAD ITS INSTRUCTION NO. 705

The court, in substituting its instruction No. 705 for defendants' BAJI 9.00.7 instruction on failure-to-warn product defect, improperly shifted the burden of proof from plaintiff to defendants.

BAJI 9.00.7 requires plaintiff to prove that the product, in this case the liner with its accompanying warning labels and instructions to affix, failed to provide an adequate warning of a substantial danger that would not be readily recognized by the ordinary user of the product. There is no requirement in such instruction that the manufacturer prove anything. In contrast, the court's instruction No. 705 requires the manufacturer to prove that it was not reasonably feasible to provide adequate warnings to the ordinary user. Thus, rather than requiring the plaintiff to prove the feasibility of providing an adequate warning to the ordinary user as mandated by BAJI 9.00.7, the court has reversed the burden and thereby misstated the law. In *Burke v. Almaden Vineyards. Inc.* (1978) 86 Cal.App.3d 768, a failure-to-warn

products liability case involving a cork popping out of a champagne bottle, the court stated at page 772:

> Appellant [plaintiff] had the burden of proving (a) that Almaden knew or should have known of a hazard which required warning and (b) that it was feasible for Almaden to have given it. (Emphasis added.)

This erroneous instruction obviously worked to defendants' prejudice and disadvantage and necessitates a new trial.

D. THE COURT ERRED IN PRECLUDING DEFENDANTS FROM SHOWING A VIDEO DEMONSTRATING THE INSTALLATION OF A VINYL LINER IN AN ABOVEGROUND POOL

As part of its case emphasizing the impracticability of pre-affixing its warning decals to the liner at the factory, defendants sought to introduce an instructional video depicting the installation of a liner similar to the one in question into a uniform depth strap oval aboveground pool similar to the one involved in the case at bar. The court sustained plaintiff's objection to same based on an early discovery response by defendants to form interrogatory 15.1 which failed to mention the subject video. That early discovery response was before defendants had even seen the liner in question and was at a time when defendants were getting acclimated to the case which had been underway for over two years before defendants were served with process. The video would have immensely helped defendants' witnesses in describing the variables associated with installing a liner to the jury. Without that visual aid, the jury was unable to fully understand the difficulties involved in

positioning a liner inside a pool frame, all to defendants' prejudice.

IV.
A NEW TRIAL SHOULD BE GRANTED BASED ON EXCESSIVE DAMAGES

Code of Civil Procedure § 657(5) provides that a new trial may be granted based on: "Excessive . . . damages."

A. THE JURY'S ECONOMIC DAMAGES AWARD WAS EXCESSIVE

Plaintiff's economist, Charles Mahla, testified to present value dollar amounts for future medicals and future lost earnings using a discount rate net of income taxes. The jury, in its response to Special Finding Question No. 9, adopted Dr. Mahla's figures to the penny.

Under IRC 8 104(a)(2), such damages are excludable from gross income and not taxable. Based on Dr. Mahla's testimony that he was using a 20% income tax rate, Finding No. 9(b) should be reduced by 20%. *Tramell v. McDonnell Douglas Corp.* (1984) 163 Cal.App.3d 157, stands for the proposition that income taxes are not to be considered by a jury.

B. THE JURY'S NONECONOMIC DAMAGES AWARD WAS EXCESSIVE

Plaintiff's attorney improperly argued that the general damages should be based on a "per diem" basis. The court properly sustained defendants' objection thereto. However, an analysis of the jury's response to Question No. 9(c) suggests that they arrived at the $4,000,000.00 figure based on a $200.00 per diem computation over plaintiff's 55 year life expectancy. 365 days, times 55 years, times $200/day equals $4,015,000.00, which rounds to $4,000,000.00.

This conclusion seems especially likely since the only other mention of a general damages sum was $2,825,000.00 as stated by plaintiff's attorney in his final argument to the jury.

Based on the foregoing, Finding No. 9(c) should be reduced to no more than $2,825,000.00

V.
CONCLUSION

Based on the above reasons and authorities, the court is respectfully urged to grant a new trial as to all issues.
Dated: September 14, 2001

Dated: September 14, 2001

PETERS, RUSH, HABIB & MCKENNA

/s/

DAVID H. RUSH
Attorneys for Defendants and Cross-Defendants

PROOF OF SERVICE

I am a citizen of the United States and am a resident of the County of Butte. I am over the age of 18 years and not a party to the within action; my business address is 414 Salem Street, Chico, California 95928.

On this date, I served the foregoing document(s) described as:

DEFENDANTS' POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL

on the parties below by a true copy thereof in a sealed envelope and served same on the parties\counsel, addressed as follows:

Jeffrey G. Nevin, Esq. Kelly C. Levy, Esq. Levy, LLP 45 Quail Court, Suite 300 Walnut Creek, CA 94596	Attorneys for Defendants and Cross- Complainant Nevin McMasker Enterprises, Inc.
Whitney A. Davis, Esq, Charter Miller Davis, LLP Post Office Box 15408 Sacramento, CA 95851	Attorneys for Plaintiff Leesa Bunch

The following is the procedure in which service of this document was effected:

X U.S. Postal Service (placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice, whereby the mail is deposited in the U.S. mailbox in the City of Chico, California, after the close of the day's business).

Personal Service

Facsimile
Federal Express
Express Mail

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document is executed at Chico, California, on September 1, 2001.

/s/
Sara Ellis

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF THE COUNTY OF GLENN

LEESA BUNCH,
Plaintiff,

[DATE STAMP]

vs.

NOTICE OF BANKRUPTCY

HOFFINGER INDUSTRIES, INC., dba DOUGHBOY RECREATIONAL COMPANY, And GOLDEN WEST MARKETING, INC.,
Defendants.

MCMASKER ENTERPRISES, INC. dba WATERWORKS UNLIMITED,

Cross-complaint,

vs.

HOFFINGER INDUSTRIES, INC., dba DOUGHBOY RECREATIONAL COMPANY, And GOLDEN WEST MARKETING, INC.,
Cross-defendants.

Separate Defendant, Hoffinger Industries, Inc. by its attorneys, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., states that it is a Chapter 11 Debtor in United States Bankruptcy Court, Eastern District of Arkansas, Case No. 01-20514. 11 U.S.C. § 362 stays further action in this case against the Debtor.

Attorneys for Debtor, Hoffinger Industries, Inc., files this pleading only as notice to the Court and any applicable

party before this Court and do not enter an appearance herein.

Respectfully submitted,
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, P.L.L.C. . .
425 West Capitol Avenue, Suite 1800
Little Rock, Arkansas 72201-3525
(501) 688-8800

By /s/
Lance Miller, Ark. Bar No. 85109
Stan Smith, Ark. Bar No. 90117
Charles R. Camp, Ark. Bar No. 79029
Derrick W. Smith, Ark. Bar No. 2000173

CERTIFICATE OF SERVICE

I, Derrick W. Smith, hereby certify that a true and accurate copy of the foregoing was served via U.S. Mail to the following this 13 day of September, 2001:

Whitney A. Davis, Esq. Attorneys for Plaintiff
CHARTER MILLER DAVIS, LLP
1515 K Street #500
Sacramento, California 95814

SUPERIOR COURT OF CALIFORNIA, COUNTY OF GLENN

* * *

DATE OCTOBER 19, 2001 COURT MET AT: 1 :45 P.M.
PRESENT HON. JOSEPH B. HARVEY
STACY KENNON, DEPUTY CLERK
NONE REPORTER
M. HAMILTON, BAILIFF

Title:
LEESA BUNCH, et al.,
Plaintiffs, APPEARANCES NOTED BELOW

vs.

HASBRO, INC., et al.,
Defendants.

McMASTER ENTERPRISES, INC.,
Cross-Complainant,

-vs-

MONTGOMERY WARD & CO., et al.,
Cross-Defendants.

NATURE OF PROCEEDINGS:

MOTION FOR NEW TRIAL, ATTORNEY'S FEES AND MOTION FOR TEMPORARY STAY in the above-entitled proceeding came before the Court at this time in the Glenn County Board of Supervisors Chambers. Whitney Davis, attorney for Plaintiff, with his associate, Robert

Osmundson, David Rush, attorney for Defendants, and Jeffrey Nevin, attorney for Cross-Complainant, are present.

Court reviews issues before the court, including the possible bankruptcy pending. After review of U.S. Code Title 11, Section 362, Court states that the filing of the bankruptcy stays the proceeding and is reluctant in making any ruling at this time.

Court drops all motions off calendar.

Copies hereof mailed and/or
Delivered to:
WHITNEY DAVIS
DAVID RUSH
JEFFREY NEVIN

* Minutes *

PETERS, RUSH, HABIB & MCKENNA
ATTORNEYS AT LAW
414 SALEM STREET - P.O. BOX3509
CHICO. CALIFORNIA 95927-3309
TELEPHONE: (530) 342-3593
FAX: (530) 342-4272

[DATE STAMP]

DAVID H. RUSH (State Bar No. 39362)

Attorneys for Defendants HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc.") & GOLDEN WEST MARKETING, INC.

IN THE SUPERIOR COURT OF THE STATE OF CALLFORNIA IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her Guardian ad Litem, TERRY BUNCH,
Plaintiff,

CASE NO. 30534

v.

DEFENDANTS' HOFFINGER INDUSTRIES, INC., DOUGHBOY RECREATIONAL COMPANY, AND GOLDEN WEST MARKETING, INC.'A NOTICE OF APPEAL

HASBRO, INC. et al.,,
Defendants.

AND RELATED CROSS ACTION

NOTICE OF APPEAL

TO PLAINTIFF LEESA BUNCH AND TO CROSS-COMPLAINANT MCMASKER ENTERPRISES, INC. AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants and Cross-Defendants Hoffinger Industries, Inc., Doughboy Recreational Company, a Division of Hoffinger Industries, Inc. (sued herein as "Doughboy Recreational, Inc.) and Golden West Marketing, Inc. hereby appeal the judgment entered August 23, 2001.

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):
Robert J. Wenbourne, #I32582
Foley & Lardner
300 Capitol Mall, Suite 1125 [DATE STAMP]
Sacramento, CA 95814

TELEPHONE NO 916-443-8005

ATTORNEY FOR (Name): Hoffinqer Industries, Inc.
NAME OF COURT: S u p e r i o r Court of the State of California
STREET ADDRESS: 526 West Sycamore Street
MAILING ADDRESS: Willows, CA 95988
CITY AND ZIP CODE
BRANCH NAME:
CASE NAME: Bunch v Hasbro

SUBSTITUTION OF ATTORNEY - CIVIL
CASE NUMBER 30534

THE COURT AND ALL PARTIES ARE NOTIFIED THAT
(name): Hoffinger I n d u s t r i e s , Inc . makes the following substitution:
1. Former legal representative Party represented self
[X] Attorney (name): David H. Rush of P e t e r s , Rush
2. New legal representative Party is representing self*
[X]Attorney
a. Name: Robert J. Wenbourne, Foley & Lardner.
B. State Bar No. (If applicable): 132582
c. Address (number, street, city ZIP,a nd law firm name, if applicable): Foley & Larnder, 300 Capitol Mall, Suite 1125, Sacramento, CA 95814
d. Telephone No. (Include area code): 916-443-8005

3. The party making this substitution is a [ ] plaintiff [x]Defendant [ ] petitioner [ ] respondent [ ] other (specify)

*NOTICE TO PARTIES APPLYING TO REPRESENT THEMSELVES
[GRAPHIC OMITTED]

4. I consent to this substitution.
Date:

Hoffinger Industries, Inc.

5. [X] I consent to this substitution.
Date 2-21-02

David H. Rush of Peters, Rush /s/

6. I accept this substitution.
Date: February 22, 2002

Robert J. Wenbourne of Foley & Lardner
/s/

SUBSTITUTION OF ATTORNEY - CIVIL

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF GLENN

LEESA BUNCH, by and through her Guardian ad Litem, TERRY BUNCH,
Plaintiff,

CASE NO. 30534

v.

HASBRO, INC.; K MART CORPORATION; MONTGOMERY WARD & COMPANY, INC.; RANGER INDUSTRIES, INC. as successor-in-interest to COLECO INDUSTRIES, INC.; SLM ACTION SPORTS, INC., and DOES 1 through 25, inclusive,
Defendants.

McMASKER ENTERPRISES, INC., dba WATERWORKS UNLIMITED,
Cross-Complainant,

JURY TRIAL - DAY 1 BEFORE HONORABLE JOSEPH B. HARVEY WEDNESDAY, JULY 30, 2001

TAMARA L. PHILLIPS, CSR NO. 11497
Certified Shorthand Reporter

APPEARANCES

For the Plaintiffs: CHARTER, MILLER & DAVIS
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(Jury selection questionnaire.
Not transcribed herein.)

symbol that everybody reads and understands. The words also on there are "no diving, no jumping" and, it continues, "crippling injury may result" and there is a picture of a wheelchair right on this label.

Now, this -- the evidence is going to establish that when this packet left Arkansas, i.e., the manufacturing plant of Doughboy, it contained that label and a similar label, there are two of them. These, by the way, are laser copies, because there were only so many originals. There are four "danger, shallow, three and a half foot" signs in there and then there are a set of instructions.

Now, what do these instructions say? First of all, the liner package itself, just the envelope says, "This package contains safety labels. All safety labels required for your pool should be affixed to the liner above the water line." That will be important, "above the water line." It says, "Caution: Diving may cause severe injuries." And we haven't even opened the envelope yet and we see this.

We then have the labels that I have shown you, and then the first thing you see here is a warranty card and this is a warranty for replacement equipment liners and it says the first words in the warranty say "Important, misuse of your pool may result in crippling injuries and or other dangers to life and health. Do not dive or jump. Do not use slides, diving boards, or any other platform or object which can be used for improper pool entry. Use only an above (276)

[BREAK]

hospital again, talked to the same social worker, and that is when I found out she had broke her neck and they were going to transfer her down to San Jose.

Q. What did you do next?

A. I asked him what I needed to do and, once again, he told me to sit and wait. I told him I couldn't, that I was going to

Chico to see her. He told me to go ahead and go home to Orland, because by the time I got to Chico she would already be gone. So I drove I5 from Sacramento to Orland and waited for my wife at the house.

Q. You drive fast?

A. Yes, I did.

Q. How long did it take to get there?

A. It seemed like forever, it was the longest drive in my life, but I made it in record time.

Q. You got Belita?

A. Actually, when I got home she wasn't there and I called the hospital again, they wouldn't give me any information, just told me that Belita was still there and for me to wait at the house, so I waited probably another hour before she finally got home.

Q Did you eventually go down to Santa Clara?

A. Yes, and they told us not to be in any big hurry to get down there, because once Leesa got down there it would be a couple of hours before we could even see her. So, once again, we drove -- or I drove with my wife to Santa Clara, we made arrangements for our son for a place to stay and drove down there. Even though I had been down there several time: working, that was the longest drive down to San Jose.

Q. Well, you did get there, eventually, right?

A. Yes, we got there. I think by this time it was about 1:00 o'clock in the morning.

Q. All right. When did you get to see Leesa?

A. I think it was about 2:00 or 3:00 o'clock in the morning when he we finally got in to see her.

Q. Where was she located in the hospital?

A. She was in Pediatrics, ICU.

Q. Please describe what you saw the first time you saw her?

A. First time I saw her she had tubes connected to her, she had tubes coming out her nose out of her mouth, coming out of her arm, coming out of almost every opening in her body she had. She was strapped to a bed and the bed rotated from side to side at a 45 degree angle continuously.

Q. Do you know why that bed did that?

A. I found out later the reason why the bed does that is to prevent bed sores, it keeps moving so that she doesn't set in one spot too long.

Q. Okay. Did you talk to her that night?

A. No, she was unable -- she was unconscious, unable to talk.

Q. Do you know why she was unconscious?

A. Well, they explained it to us later that because of Leesa's injuries and stuff she couldn't mentally handle her injuries and she would go into shock if they let her come to, so what they did, they gave her a drug that inhibited amnesia so that every time she woke up she woke up in a different world, she didn't remember the time before.

Q. Well , did there come a time when you could communicate with her?

A. Yes , eventually she did have surgery on her neck to stabilize her neck and at that time they did a tracheostomy on her so that she could breathe, because at the time she could not breathe on her own and one of the tubes in her mouth was a ventilation tube.

Q. Okay. So was the tracheostomy the item that your son described earlier with regard to allowing an airway through something other than the mouth?

A. Yes .

Q. Okay. And at some point did you communicate with her?

A. Yes . After she had the trach put in and all of the tubes taken out of her mouth and nose, then she was able to talk and we did communicate at that point.

Q. How long did she stay at Santa Clara Valley Medical Center?

A. August 13th t o January 24th, I think, or 25th.

Q. When did she first speak with you?

A. About three weeks after her accident she spoke.

Q What did she say?

A. One of the first things she said to me, the bed was rotating back and forth and she was trying to talk and she couldn't talk real loud so it was hard for us to understand her and finally one of the nurses figured out what she was trying to say and what she was trying to tell me was my pants were unzipped, every time the bed rotated over toward me she could see us at eye level.

Q. Did it appear to you that Leesa had somehow recovered a sense of humor from this?

A. Yes, it was amazing through all she had been through she still had a sense of humor.

Q. Does she have one now?

A. Yes.

Q. Who scratches her nose now?

A. The nurse, dad, mom, brother, whoever is around.

Q. Were you ever told that Leesa would be able to come home some time?

A. One of the first things that doctor told us, the first night we were there he said that with Leesa's condition she would probably never leave a hospital, she would always have to be in an institution somewhere.

Q. Did he explain why?

A. Because with her level of injuries it was impossible to take care of her at home, because she was on a ventilator, quadriplegic, susceptible to pneumonia, and at that time she
(353) [BREAK]

and there can be literally be very large sores that can go all the way down to bone if not picked up earl y enough.

Q. Are those bed sores?

A. Yes , it would a l s o be referred to as bed sores or pressure sores.

Q. With regard to Leesa's injury, what is your understanding of how she was injured?

A. As I recall , it was a diving injury into an above ground pool.

Q Doctor, what is your understanding of the mechanics of the injury, what was broken, what was hurt?

A. She had a dislocation of the C-3 vertebrae on top of the C-4 vertebrae. So as they normally sit in alignment, the top vertebrae shifted and moved forward, thus compressing the tunnel where the spinal cord is located and that produced a crush injury to the spinal cord.

Q. Did somebody attempt to move the dislocation back?

A. My understanding is that with acute management she was placed intraction to try to move the displaced vertebrae back into better alignment, that is typically done with these types of vertebral injuries .

Q. Okay. And so the cord was crushed due to this dislocation?

A. Yes.

Q. Is that a complete or incomplete injury to the spinal cord?
(398) [BREAK]

the year before that , he was seven, 19 -- probably 1989, 190, something around there.

Q. Can I put 1989 or '90 over there?

A. Yeah --

THE COURT: I would like you, if you can, to speak up a little louder, all of those four people back there have to hear, it is extremely important that they hear and so talk as loud as if you are talking to them at all times .

THE WITNESS: Okay. Sorry.

THE COURT: Uh-huh.

THE WITNESS: We moved out there in '88, so it had to be probably '90, because we went a year without a pool.

MR. DAVIS: Okay. Do you remember if there were any labels on the pool parts -- well , strike that , I'll lay a foundation.

Q. In what form did you get the pool from the Royce's?

A. It was just the walls with the screws and all of that and the top. It was just all apart, we had t o take it apart.

Q. Did you go over there or did the Royce's take it apart?

A. Y e s .

Q. Was there a liner in the pool when it was over a t the Royce's?

A. It was rotten , the wind blew it, it was rotten.

Q. What was the l i n e r made of?

(461) [BREAK]

'97/'98 pool here. I want to talk to you about a replacement liner.

A. Okay.

Q. Do you recall obtaining a replacement liner for the Royce's pool?

A. Yes.

Q. And where did you buy that?

A. Waterworks.

Q. Did you go get it with your husband or by yourself?

A. No. My husband and I went and got it.

Q. Approximately what size was the box, do you remember?

A. No, it was big, that is all I know.

Q. Okay. Now, were you there when it was opened?

A. I don't remember if I was. Probably, but I wasn't concentrating on that, because we were doing the rest.

Q. And tell us about how you all put the pool up?

A. We had the neighborhood over and our friends and we had a pool raising, get together with a barbecue.

Q. Okay. (People's Exhibit 17 was marked at this time.)

MR. DAVIS: 17, your Honor.

THE COURT: All right. The whole group?

MR. DAVIS: No, just the first one.

Q. I show you what has been marked as Plaintiff's Exhibit 17, Ms. Frank. Do you recognize that photograph?

A. Yeah.

Q. Was that photograph taken at or about the time of the pool raising party?

A. Looks like it, yes.

Q. And why do you say that?

A. Well , it might have been the day after , because all we did was put the liner in and put clothes pins on to hold the liner and then everybody left.

Q. Okay. Who is that in the pool?

A. My husband, Joe Frank.

Q. Who is that in the white shirt?

A. Me .

Q. It is a little grainy, but is that liner the liner that you purchased a t Waterworks?

A. Yes.

Q. Allright . Now, I see over on the right over here -- sorry, I will get over here. At the time this picture was taken had you all completed the construction of the pool?

A. No, we still had the -- to put the rest of the caps on it.

Q. You are speaking about this area here?

A. Yes.

Q. And do you recall the depth of the pool?

A. It was four feet from one end to the other.

Q. Four feet from one end t o the other?

A. From that , you know, four feet deep it had no deep

(471) [BREAK]

sensible way to enjoy your pool?

A. Yes.

Q. Did you ever get one of those booklets with your replacement liner?

A. I don ' t remember.

Q. Did you ever sign the back of a booklet verifying that you read it, that was given to you in the liner package, if any, on the replacement liner?

A. No.

Q. Do you know when you got the replacement liner versus when you got the Royce pool, how many months or years after?

A. The replacement liner that Leesa was in?

Q. Yes.

A. What, five years after?

Q. Well, how many replacement liners did you have?

A. We had the original liner, then we got the replacement liner.

Q. The original liner from the Royce's?

A. No, we had to buy a liner to go with the pool.

THE COURT: I am going to have to ask you one more time -

THE WITNESS: To speak up?

THE COURT: Okay. Let me tell you, it is a very practical problem and I often get into, that is when the attorney is close to the witness they have a strong tendency, because we all do this in ordinary conversation, just to talk

(496) [BREAK]

A. Yes.

Q. Where did you learn that from?

A. Just watching 911.

Q. Did you ever receive anything from Doughboy telling you anything about the number of spinal injury victims that had made claims against them?

A. I don't remember.

Q. Did you think -- why did you tell the kids the rules -- strike that. How did you tell the kids the rules?

A. I took them by the hand, took them by the pool, said the pool is shallow, there is no deep end, there is no diving, because you could hurt yourself. It is the only thing I said, and I said, "Please observe the rules."

Q. All right. Did you say this to little kids as well as big kids?

A. Yes.

Q. Now, do you remember what you said in your deposition with regard to whether other kids who dived in your pool head first before?

A. No, I don't.

Q. Would you like to refresh your recollection by looking at your deposition?

A. Yes, I would. What page?

Q. Look at 51, Lines 1 through 16.

A. Okay. I don't know who shallow dived, I don't remember, but I always told the kids that I didn't want --

(505) [BREAK]

could have been three and a half feet.

Q. Do you know specifically where it was kept at based upon the skimmer level?

A. No.

Q. Or should we ask Joe?

A. Ask Joe.

Q. All right. Now, prior to the accident did you go inside the house?

A. Yes.

Q. And when you went inside the house were the kids in the pool?

A. I don't remember if they were or not.

Q. Okay. Well, would you like to refresh your recollection on that?

A. What page?

Q. 55. And that was what, three years ago almost?

A. For this?

Q. Yeah.

A. Yes.

Q. Okay. That is all right. I direct you to Lines 4 through 9.

A. Okay. So they weren't in the pool, but they had been in and out with me, "me out" "me in" "me out" "me in" because they were throwing water balloons.

Q. Well, you need to speak up and do it a little slower, I want to hear about the water balloon fights.

A. The kids were having water balloon fights , they were throwing water balloons over the house and having water balloon fights .

Q. So they didn't do it while they were in the pool?

A. No.

Q. And you felt like it was okay to go inside?

A. Yes .

Q. How did you learn that the accident took place?

A. Tyler said, "Something is the matter with Leesa."

Q. Tyler did?

A. I think it was Tyler.

Q. And where did he say this to you?

A. I was coming outside and Tyler met me and I grabbed the phone.

Q. Then what did you do?

A. I went, ran out there to Leesa, and she said, "I can't breathe," and she was scared and I calmed her down while I was calling 911 and she eased her breathing, she j u s t relaxed t o where she could a t l e a s t catch her breath.

Q. Did she at that point tell you about anything that had happened?

A. No.

Q. Who else was there with you while you were comforting her?

A. Tyler and Erick.

Q. Did someone else eventually join the scene?

(508) [BREAK]

Q. When you -- back at the time of the accident knowing what was on your pool and the various decals and the ladder and all of that that we have gone over, was it your feeling at that time that the warnings that were on the pool were adequate?

MR. NEVIN: Objection, your Honor. May we approach on this one?

THE COURT: Yes. Uh-huh. (Bench conference, not reported)

MR. DAVIS: What was the ruling, your Honor?

THE COURT: I sustained the objection.

MR. RUSH: Q. Did you undertake to give any warnings to the children back at the time of Leesa's accident other than those warnings that were physically present on the pool and the oral warnings that you have described?

A. Say it again, please.

Q. Did you undertake at the time -- and I am including the weeks leading up to and including the day of Leesa's accident -- to warn the children regarding the dangers of no diving by use of the labels that were in existence already on the pool together with your verbal warnings?

A. I expected that my verbal warnings would be adequate.

Q. Okay.

THE COURT: Was that a "no" answer then?

THE WITNESS: Yes.

MR. DAVIS: I am sorry, your Honor, just for clarity is it "yes" and "no" or?

MR. RUSH: Let me rephrase it.

Q. Was it your perception at the time of these events, including the weeks leading up to and including the date of the accident, that the children would be exposed to both the warnings that were on the pool and your verbal warnings that you described?

A. Yes .

Q. If you had seen Leesa in the process of diving, in other words, if she was about to dive and you saw that she was about to, is it correct that you would have attempted to stop her because you knew that she could be facing substantial risk of injury by diving?

A. Yes .

MR. RUSH: Nothing f u r t h e r , your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

MR. DAVIS: Very brief .

Q. How long after the old pool was built did astro turf get in there, get on the deck.

A. That was -- the old pool, when we put it up and put the astro turf in there?

Q. Yeah?

A. Well , the -- a year.

Q. I was just looking at Exhibit M and I didn't see any

(528) [BREAK]

A. No. No.

MR. DAVIS: Okay. That is it.

RECROSS-EXAMINATION

MR. NEVIN: Q. You were shown a whole bunch of pictures by Mr. Rush.

A. Yes.

Q. Here they are. Are these pictures in large measure duplicates of each other? In other words do they show different perspectives of the same warning?

A. Yes.

Q. So these, what are there, there's 25 pictures, are not separate distinct pictures of 25 warnings?

A. No.

Q. They are just different shots around the pool?

A. Yes.

MR. NEVIN: That is all I have. Thanks.

RECROSS-EXAMINATION

MR. RUSH: One final clarification question, Your Honor.

Q. Ms. Frank, is it true that on the actual date of the accident, the very day that Leesa was injured, you also took Leesa and Erick by the hand and said, "Remember the rules, it is shallow, no diving."

A. Yes.

MR. RUSH: Thank you.

MR. DAVIS: Nothing further, your Honor.

THE COURT: Anything f u r t h e r ?

MR. NEVIN: Q. Well, I am just a little confused now that he raised that question, and I am getting hungry for lunch too, but did you do the hand holding thing with them once or?

A. Yes , I always do.

Q. Once or twice?

A. Once.

Q. So maybe I am just not getting it --

A. Erick had been to the house before.

Q. Okay.

A. And I had told him before, Erick knew. Leesa, I am not sure that she swam in the pool before, so I took her and Erick both, showed them the length of the pool, said it was four feet deep and do not dive, it is shallow.

q. But that happened with Leesa one time?

A. Yes , sir.

MR. NEVIN: That is a l l I have.

MR. RUSH: Nothing further .

THE COURT: Thank you, very much.

MR. NEVIN: Your Honor, are we going to go to 1:00 o'clock today?

THE COURT: Well, it is really dependant on the plaintiff.

MR. DAVIS: What is that , your Honor? I am sorry.

(531) [BREAK]

entry point of his pool. And that's the reason we don't supply it. But we do supply it along with the instructions.

Q Now with reference to -- confining ourselves for a moment just to the liner kit itself, does that come in a single box or multiple boxes or what?

A Our liner comes in one box.

Q All right. What is in that box, in that carton besides the liner if anything?

A Well, the liner kit contains the liner itself and the safety information pack, which is placed on the very top of the liner so that when you open it, you can see that right away. It's not stuck inside it or anywhere. That's the last thing that goes into the liner. It's right on the very top in the box.

Q So if you look at a parts list such as the one that you're talking about with reference to the Timberline -- what's it called?

A Timberline -- (Reporter interrupted proceedings.)

THE WITNESS: Timberline strap oval pool.

Q (By MR. RUSH) Okay. And "oval" referring to -- shaped like a football or --

A Shaped -- not like that.

Q -- football field?

A Shaped like a football field, yes.

Q And what does the 11strapn refer to?

A There's a series of inch-and-a-half to two-inch wide straps that go from side to side of the pool to keep the sides on an oval pool from expanding out from the water pressure. It holds the bottom together and they're called straps. They go from side to side of the pool. They're attached to the very bottom of the pool.

Q Now on the Timberline strap oval pool parts list that you have identified in the 1989 service manual, does it show by individual part number and/or description what is contained in each of the segments or separate kits?

A Yes, it does. It's -- the parts list is what I'm looking at right now and it's a complete breakdown with the part numbers of each of the parts that go into the pool kit along with the -- there's a frame pack with all of -- a breakdown of all the part numbers in it and the quantities required for an individual pool kit. It also has a pool liner kit carton. It has a side wall carton. It has a support pack four and a support pack six. And all of these components are required to make up the strap oval pool.

Q Now can the dealers order from you any one of these kit cartons separately, or do they have to buy everything?

A No, they can order any of these separately any time they want. Everything has its own part number and it can be bought.

Q And if a retail customer comes into a dealer, then does -- can the dealer supply separate component kits to the retail customer?

A Yes, he can.

Q All right. So if a person came in and said, "I just -- I don't need the frames and the skimmers and the pumps and all that. I just need a liner," can -- can that person secure just the liner kit?

A Yes, he can.

Q All right. Now you mentioned that in addition to the liner, there was a liner information package; is that correct?

A Yes.

Q I'm going to show you Exhibit A and ask you to take a moment to review it, open it, look at it, and tell me if that, in fact, would be the liner package that would be supplied with the liner kit that would be purchased by someone such as Mr. Frank.

A Yes, it would have.

Q Now referring to the parts list, to double check this --

A Um-hum.

Q -- would you -- would you read -- I see in this package there's a -- Xerox copies of -- is that simply copies of the actual originals in here?

A Yes. This is just copies of everything that's right there.

Q So would the package be complete without a Xerox copy of what's actually there?

A Yes, that would not come in this package. That's just a copy of everything that's right here.

Q Okay. Now what is the first item in our parts list there?

A Chlorine and winterizing instructions.

Q Would you double check the parts number versus the document you're holding there?

A This is the correct one.

Q Okay. What's the next one?

A The next thing on the parts list would be the liner itself, and you would have the danger decals.

Q And how many of those?

A A quantity of two.

Q Would you double check those, please, against the list?

A Correct.

Q Okay. What else is in there?

A The warranty card.

Q Now would the warranty card for a replacement liner be exactly the same as the one on the kit such as you're reading from?

A No.

Q All right. Would you examine this warranty that's in the packet and tell us if that was the warranty that would accompany a replacement liner?

A Yes, it would be.

Q And is that the correct one for that -- the year in question?

A Yes.

Q What s next?

A The "danger, shallow three and a half foot" decals.

Q And how many of those?

A A quantity of four.

Q Would you check these?

A These are correct.

Q Okay. What's next?

A The installation instructions for the danger decals .

Q Would you check this document?

A Yes. Q Is that correct?

A Yes, it is.

Q Okay.

A Now I missed one, the repair patch.

Q Is this it?

A Yes, that's the one I missed.

Q Is there an envelope that goes with it?

A Yes, there is.

Q Would you double check this envelope?

A Yes, this is the correct envelope.

MR. RUSH: Offer Exhibit A, your Honor.

THE COURT: It will be received.

Q (By MR. RUSH) Now let me take just a second to put this back together. If you would look in the service manual that we -- was provided to the other side during discovery, are there pictures in there of the chlorine instructions?

A Yes, there is a copy of the chlorine instructions in here.

Q What about the winterizing instructions?

A Yes, on the back side.

Q Okay.

A They're all on one tape.

Q And are there pictures in the manual of the installation instructions themselves?

A Yes, there are.

Q And that comprises of several pages?

A Several pages. That's together.

Q Okay. And does the -- do the installation instructions also show a picture of the "danger warning1' labels as well as the "shallow, three-and-a-half foot" label?

A Yes, they do.

Q Now I noticed on that page there's also another label, "danger, deep area."

A Yes.

Q Is that a label that would be supplied for a pool that has a uniform depth of three-and-a-half feet of water?

A No, it would not.

Q So that would not be in the package?

A That would not be here.

MR. RUSH: I would offer the '89 service manual, DD, your Honor.

THE COURT: That will be received.

Q (By MR. RUSH) Now would you describe for us the actual manufacturing process that can give us some sense of confidence that, in fact, this particular liner kit would have contained the liner information package that you've described? So if you could take us back to the plant and give us a picture of what goes on in the plant with reference to that liner package.

A Okay. We have a person that's at our factory that is called the pre-patch assembler. It's a -- normally it's a lady that takes a product structure, which is a detailed account of what is supposed to be included in an information package. She has all of the parts, all

(760) [BREAK]

all of those 11 or so pools that you erected or helped erect, how many of them ended up having a liner label put on them by the homeowner?

A None that I'm aware of.

Q So in Glenn County -- strike that. All right. Did you buy a replacement liner for your Doughboy -- or your Royce pool, the Coleco Royce pool?

A I bought a liner because it did not have one when I acquired it.

Q Okay. And we're calling that the replacement liner?

A That's fair enough.

Q Okay. I want to go over this chart with you real quick. Your wife testified that she estimated at least 1990 was the date that you got the Royce pool from the Royces. Is that your recollection?

A No. I believe it was earlier than that.

Q About when, in your estimation, because people can remember things differently, right?

A Yes. I believe it to be '88 or '89 when we put it in. We moved into our house in the summer of '87. And I put it up either the next summer or the following summer.

Q Okay. Now do you know when the Doughboy replacement liner was purchased? A I was able to backtrack and find a checkbook register receipt showing a check written to Waterworks in April of '88.

Q Excuse me. When?

A April of '88.

Q I'm going to put "4-88" here. Did you bring that checkbook with you?

A Yes, I did.

Q Can I see it, please? Can you show me where on this it's indicated?

A (Witness indicating.)

Q Okay. Could you read for the record the check number that was -- that was written to Waterworks?

A Check Number 1223 written to Waterworks for $311.57.

Q Now does it say replacement liner on there?

A It does not.

Q How do you know that was for a replacement liner as opposed to anything else?

A It would have been the only thing I would have bought at Waterworks that would have cost that much money.

Q Okay. Do you need that anytime soon? That check register?

A No, I don't.

Q May I mark it as an exhibit?

A Yes, you may.

Q Thank you.

MR. RUSH: May I see it, Mr. Davis? (Pause)

MR. DAVIS: We'll mark that as Plaintiffs' 40, the Joseph Frank check register.

Q (By MR. DAVIS) When did you find this date out, Mr. Frank? When did you discover the check register?

A I actually found it last night. I didn't realize that I had kept registers that far back.

Q Where did you find it?

A I couldn't find the receipt I was looking for. I really thought I had it.

Q Where did you find the check register?

A In a box with a million other check registers.

Q While I'm waiting to mark your check register, in any of the 11 or so pools that you have constructed -- let me just put this here for a minute -- constructed or help construct, did you see liner labels like Plaintiffs1 3 or 24 come with a liner?

A I'm sure that I did on certain ones. I couldn't say specifically which ones.

Q Do you know if the Doughboy replacement liner that you purchased in April of '88 -- well, had the 1988 Doughboy sticker, Plaintiffs 24, with the liner?

A I couldn't be specific, no.

Q Well, do you know if the Doughboy replacement liner that you got -- did it have a --

MR. NEVIN: A.

Q (By MR. DAVIS) Defendants' A. Did it have the liner information package in it?

A I believe it did, yes.

Q Do you recall that?

A That package looks familiar.

Q Okay. But you can't specifically recall whether either Plaintiffs' 24 or -- Plaintiffs' 24 was in there?

A No, I cannot.

Q And you can't recall whether, of course, the 1989 warning was in there?

A I cannot.

Q After Leesa's accident, Mr. Frank --

JUROR NUMBER 2: Um, I just have a question.

MR. DAVIS: Okay. (Pause)

Q (By MR. DAVIS) Mr. Frank?

A Yes.

Q The juror's asked a question which I'm going to ask you a question on. Did you buy the replacement liner before you got the Royce pool or after?

A After.

Q Did you buy the replacement liner before or after you erected the Royce pool?

A Before.

Q How long did the replacement liner box sit in your garage before you got it all put together?

A Several months.

MR. DAVIS: Could I see the question again and make sure I took care of it?

MR. NEVIN: It's over here.

Q (By MR. DAVIS) I marked your check register as Plaintiffs' 40. Sir, I'm not going to ask you some legal questions as a matter -- that came from Britain I think. Are all of the writings inside or notations inside of Exhibit 40 your handwriting?

A No. I'm sure that some of them are my wife's also.

Q Is the Waterworks entry yours?

A Yes, it is my writing.

Q Was that writing made at or about the time that you purchased the liner in approximately April of '88?

A It would have been the same day, yes.

Q Can we flip to the front page? What's on the front page? You don't have to talk about the amount of deposits it has on it.

A This? On the front page is a deposit record in which it states Joe Frank, 4226 Drew's Way, and the account number.

Q Are those your initials there on the deposits

A No. These would be the bank -- personnel initials.

Q And where did you bank at back then?

A I believe we were at Tri-Counties Bank at that time. It could have been Bank of America.

Q After Leesa's-accident, sir, did you make some changes?

A The following swimming season after that, yes. We made some adjustments to the deck and configuration.

Q Did you rip out the benches?

A We tore out the railing and benches and we -- the decking was due for a change anyway, so we tore it apart, and I reconfigured it as a two-step deck thinking that might help slow down people from walking or running, etcetera.

Q Did you add any stickers?

A The only thing I did after the fact -- I added -- I had a four-foot deep sticker or two of them, actually, which I added to the railing I put up on each side.

Q I'll show you what's been marked as Plaintiffs' 7. Rob, could you light that up for us? Sir, do you see the two stickers that you added to the railing after the accident?

A On one railing I see only one sticker but, yes.

Q Okay. So you had -- you had two railings that you rebuilt?

A One on each side, yeah.

Q And after the accident, you put a four-foot deep "no jumping, diving" stickers on both railings?

A One on each side, yes.

MR. DAVIS: I'll show the jury -- it's a little easier if you can zoom, Rob. I appreciate it very much.

Q (By MR. DAVIS) Now did you receive any stickers from Doughboy with the replacement liner that said "four foot deep, no diving"?

A These, I believe, came from the original package that Mr. Royce gave me, but I can't swear to that. If there were any in the package, I do not recall them. They may have been there but I do not recall.

Q All right. That's all I have. Do you need the picture?

MR. NEVIN: No.

MR. DAVIS: Are you going to need the picture?

MR. RUSH: No.

MR. DAVIS: That's all I have. Mr. Nevin, do you have any?

MR. NEVIN: I do.

DIRECT EXAMINATION BY MR. NEVIN

Q (By MR. NEVIN) You said that you installed ten pools?

A Helped install.

Q And they're not all in your backyard, are they?

A No.

Q That would be like Waterworld.

A Or worse, yes.

Q Are those pools in the local area?

A Yes, they are.

Q In the backyards of local families?

A Yes.

Q Are those pools still up?

A To the best of my knowledge, they are. Not all of those places I still frequent so . . .

Q How'd you get brought into that assignment for all those pools?

A I believe the fact that I put up several -- you just kind of get invited to do more and more of them.

Q And is it your testimony, sir, that on none of those pools there are any warning labels on the -- on any of the liners?

A None of them after the fact that I have ever seen had any. Whether they had them added after the fact -- that I don't know about. I couldn't say.

MR. NEVIN: All right. That's all I have.

THE COURT: Cross?

MR. RUSH: Yes. Thank you.

CROSS-EXAMINATION BY MR. RUSH

Q (By MR. RUSH) Good afternoon, Mr. Frank.

A Good afternoon.

Q I know you're not feeling too well. Are you able to continue?

A Yes.

Q The pool that you presently have, the Lomar pool --

A Yes.

Q Did that come with warning labels to go on the liner?

A It did come with them. However, they were not put on by the company that installed the pool.

Q You're the one that put them on?

A I did not put up that one myself.

Q But you put the labels on the liner yourself?

A Yes, I did.

Q So they came -- I guess what I'm asking is they came along with the liner package for -- to be affixed after the water was in the pool, and you saw the liner in place, correct?

A Yes, being that someone else did the installation, it really wasn't a package. There were bits and pieces, some things that they kind of threw at me and said, "Here's what's left." --

(932) [BREAK]

Q. In any of your swimming experience do you recall injuring yourself?

A. No.

Q. In your deposition somewhere it said that you bumped a finger or brushed a finger?

A. Yeah, I barely hit it.

Q. Was that in a deep pool?

A. Yeah, in a deep pool.

Q. How did you brush your finger?

A. I dove off the diving board at the Ogle's and I was doing a gliding thing, and it was in the deep end of the pool and it sloped up to the shallow part, and I just wasn't expecting the slope, so my finger hit it.

Q The slope came a little faster than you thought?

A. Yeah.

Q Did you ever think you needed a spotter in the pool?

A. No, the water always kind of caught me.

Q. It caught you?

A. Yeah.

Q Prior to August 13th, 1993 -- are you okay?

A. Yeah.

Q. Have you ever taken a dive off a bench?

A. No.

Q Do you know why you dove off the bench that day?

A. No, not really. I remember I had been doing those racing dives all day, but --

Q. Were you gliding too?

A. Yeah.

Q. Did you get' to the other side that day?

A. No.

Q Do you think you could get to the other side if you went off the bench?

A. Yeah, because I would dive further out.

Q. Well, did you know when you were 11 years old if you got up on that bench you might not go further out, but you'd enter the water at a different angle?

A. No, I just figured I'd dive further out. Do the same thing.

Q 5 years. I can't believe I'm looking at paper and asking you questions. Do you remember when we met?

A. Yeah.

Q. Were you still on the ventilator then?

A. I don't remember. Probably more than I am now, but I don't know.

Q . Before we go into your medical stuff I want to talk to you about Loretta Frank?

A. Okay.

Q. She kissed you on the way out the other day?

A. Yeah.

Q. Let's talk about Loretta. Did you enjoy receiving that kiss from her?
(1189) [BREAK]

Q Is that a pike?
A. Yes.

Q. Did you know how to do a pike?

A. No.

Q Did anyone ever teach you how to do a pike?

A. No.

Q. Do you remember seeing these stickers in Exhibit 14 on the pool that day, and I can show you a real life one if that would be helpful?

A. I vaguely remember, yeah.

Q. And "No diving in shallow water" and the guy with the pike, and it says "caution?"

A. Yeah.

Q - Do you recall what it meant to you when you were 11?

A. Not to dive like that.

Q. Like this guy, okay. Did that label tell you that you're going to break your neck?

A. No.

Q. You had your deposition taken; right?

A. Yes.

Q How was that experience?

A. It was not fun.

Q Did you get tired?

A. Yeah.

Q. But you told the truth?
(1194) [BREAK]

In recess until 20 minutes to. (10 minute break was taken.)

BY MR. DAVIS Q. Now, there 'is a legal question I technically have to ask for it to be legally sufficient. Leesa, if you can tell us when you were 11 is it more probable than not that you would have followed the warnings had they been on the pool?

A. Yes.

Q. And what is it about these warnings? Is there anything about these warnings that you haven't told us already that would have stopped you?

A. No, I think I told you.

Q. There are some factual contentions, Leesa, about how you dove, so we need try to probe your memory a little bit?

A. Okay.

Q. With regard to that day, do you remember how that day started out?

A. Yeah.

Q. Okay, tell us.

A. I remember it was hot, so me and my brother were playing outside.

Q Outside?

A. Outside, yeah.

Q. And Josh showed up and invited us to go swimming. So my brother called Loretta, or actually I think my mom called Loretta. Somebody called her to make sure it was okay, and my mom was going to go to Chico to run errands or something, so Loretta was kind of going to watch us.

MR. DAVIS: Excuse me, Your Honor, could I reposition Leesa a little bit so the jurors --

THE COURT: Say that again?

MR. DAVIS: Can I ask permission to have Leesa face the jury?

THE COURT: Yes. As a matter of fact I think I will come over there so I can hear her a little better myself.

MR. DAVIS: Thank you, Your Honor.

BY MR. DAVIS Q. So somebody called Loretta?

A. Yeah somebody, and she said that it was okay if we went over there. So me and Erick and Josh all headed to Loretta's, and I don't know if we picked up the Breedings on the way

or if they showed up, I'm not sure, but we got there and she said it was okay for us to go swimming, so we did.

Q. Okay. About what time did you all start this day?

A. It was in the afternoon. It was after lunch.

Q. It was after lunch. Did you eat lunch at Loretta's or was it a second lunch?

A. It was probably a second lunch.
(1198) [BREAK]

A. The deep end pools, yeah.

Q. Was Loretta out there the whole time?

A. No.

Q. Do you know where she'd watch you from?

A. Sometimes in the kitchen and from the table in the dining room.

Q. Well, did she ever leave the house while you guys were out there? I mean leave to go do errands or something?

A. No.

Q So she always stuck close to the pool?

A. Yes.

Q. Now, your brother testified. I'm not sure if you were here or not, but your brother testified that Tyler dove from the bench too that day. Do you remember one way or the other whether he did?

A. No, I don't remember.

Q. At some point does your memory get fuzzy?

A. Yeah.

Q Take us right up to the point that your memory stops.

A. I remember swimming for a long time, and I probably dived, dove twice maybe.

Q From where?

A. From the deck on the side.

Q On the side of the pool? pool?

A. Yes.

Q. And did she tell you that as recently as a week to a week and a half before your accident occurred?

A. She might have, I don't --

Q. You are just not sure?

A. I don ' t remember.

Q. Okay. So -- and, by the way, did you swim in any other pools other than the Frank's pool either in '92 or '93?

A. Yes.

Q. And what other pools?

A. I swam a t the Orland City Pool, the Willows City Pool, the Breedings pool, the Ogles pool, the Souza's. I think that is it.

Q. Did the Willows City Pool have a shallow end?

A. Yes .

Q. Did they have "no diving" signs down at the shallow end?

A. I don't remember.

Q. Did the Orland City Pool have a shallow end?

A. Yes .

Q. Did they have "no diving" down at the shallow end?

A. Yes.

Q. Did the Ogles pool have a shallow end?

A. Yes.

Q. And was that an above ground pool?

A. That was an in ground pool.

Q. In ground. Did the Ogles have a rule not to dive in the shallow end?

A. I don't remember them saying anything, but they probably.

Q. Probably did?

A. I think so.

Q. What did the Souza's pool, what kind of pool was that ?

A. It was above ground.

Q. And was it a uniform depth pool or?

A. Yes.

Q. And so it was a relatively shallow pool throughout?

A. Yes .

Q. And were there no diving rules there?

A. Yeah -- well, you couldn't dive because it was laying on top of the ground.

Q. I am sorry?

A. Like there wasn't really an -- it was sitting on top of the ground, so there was no sides, like --

Q. How did you get into the pool?

A. There was like a little ladder that you went up.

Q. So was there a rule not to dive off the top rung of the ladder?

A. I think there was a "no diving" sticker .

Q. Okay. And what where the Breedings pool, what kind of pool did they have?

A. It was an above ground, I think.

Q. Okay. And did it have a shallow end?

A. Yes.

Q. And was there a no diving rule there?

A. Yes.

Q. And did Mrs. Breeding tell you, "No diving."

A. Yes.

Q. Now, I think you testified that you did do some diving, right, in the Frank's pool?

A. Yes.

Q. And I believe you described it as a shallow dive?

A. Yes.

Q. And what do you mean when you say, "A shallow dive", what kind of dive is that?

A. It is more of a -- kind of horizontal where you jump out instead of up and down.

Q. You said something about liking to -- I think you said liking to glide after the dive?

A. Yeah.

Q. So you would shallow dive and stretch out and then try to glide as far as you could, is that it?

A. Yes.

Q. And with reference to your shallow dives, why were you diving shallow dives?

A. Because that is what I enjoyed, that is what I was good at doing.

(1556) [BREAK]

know if you can see it Leesa from where you are at, it shows a kind of a graphic figure and a bent or diving position, would you agree?"

"Answer: Yes. "

Now, let me interrupt myself there. Were you referring to the -- let me get -- excuse me.

MR. DAVIS: There is a picture up here.

MR. RUSH: Let me -- well, I wanted to get something that she didn't have to turn and twist to try to see.

MR. DAVIS: The metal bar is in the corner.

MR. RUSH: Let's get the metal bar, that is the easiest. Yes, just the metal bar I think.

MR. DAVIS: Leesa, would you like a copy to look at while he is reading it to you?

A. No, I am okay.

MR. RUSH: Excuse me, Leesa.

Q. This is the railing, we've stipulated that the condition of the railing is a little different than it was at the time, but it was here to show the symbol and the caution sign; do you see that?

A. Yes.

Q. Was that the symbol you were talking about, the one with the diver in the middle of the circle?

A. Yes. THE COURT: And I believe that has been characterized previously in testimony as the pike position.

MR. RUSH: Yes, I think so. That is Plaintiff's 6, for the record.

Q. Let me go ahead. Are you with me here?

A. Yes.

Q. "Question: And there is a circle around it and a slash through it?"

"Answer: Yes. "

"Question: What does that mean to you, if anything?"

"Answer: If you are not a good diver, don't dive."

"Question: It means that to you?" "Answer: Yeah. "

"Question: From what do you get the impression that it has anything to do with good divers or not good divers?"

"Answer: Just because they have to in case -- I don't know, it is just -- I didn't think it applied, because I knew what I was doing."

"Question: Meaning that you felt you knew what you were doing on those occasions when you were diving?"

"Answer: Well, I thought I knew how to dive so that I wouldn't get hurt. "

"Question: Okay. So in your mind there was a correct way to dive into these pools?"

"Answer: Yes."

"Question: And that was the shallow type?"

"Answer: Yes. "

"Question: And was there an incorrect way to dive

"Answer: Anything that wasn't a shallow dive."

"Question: Okay a more angular or steeper or direct dive was incorrect?"

"Answer: Yes. "

"Question: Why?"

"Answer: Because you would go straight to the bottom. "

"Question: With what?"

"Answer: Your hands, I guess."

Do you recall that general testimony?

A. Yes.

Q. So part of the reason that you did the shallow dive was so that you wouldn't go straight to the bottom as you described in a more vertical dive, would that be correct?

A. I hadn't really thought about it. I just enjoyed doing shallow dives.

Q. But you knew there was a correct way and an incorrect way, I think you said that in your deposition?

A. Yes.

Q. Now, what were the warning labels such as the one I just showed you on that metal, were they there throughout the summer of '92 as well as the summer of '93?

A. I think so.

Q. Thank you, Leesa, for your patience. Nothing further, your Honor.

(1560) [BREAK]

of this.

MR. RUSH: Okay. I didn't know if it was the same thing or not.

MR. NEVIN: Your Honor, and this is their final reply redacted to cut out any --

MR. RUSH: That brings up the next issue .

THE COURT: Just a moment.

MR. RUSH: I don't see why if we are going to introduce this letter -- and I am referring now to the November 10, 1998 letter from Moss t o Jeffrey Nevin. And, of course, I can read it here that the part that has been redacted says, "After reading your letter and the demands made therein , in light of what you have told me regarding the current status of this case gives me cause to be reluctant in coming to your defense in this matter." I don't see anything wrong with that .

MR. FLAHERTY: Current status of the case is in reference to the default.

MR. RUSH: Yeah. And, obviously when someone is presented with,"Well , you come defend me. By the way, there is a judgment that is already against me now ..." and I have given this a lot of thought, your Honor, we have discussed this before, but this insurance company is on the line for a million bucks because that is it' policy limit .

THE COURT: Yes .

MR. RUSH: At this point in time --

THE COURT: They are really not on the line for a million bucks if they haven't received any cooperation from their insurance, are they?
MR. NEVIN: No.

MR. RUSH: Well, they exposed.

THE COURT: Yes, they have an exposure. They have an exposure if -- certainly have an exposure if the product is, in fact, defective.

MR. RUSH: Right. Understood. But, I am talking about the various considerations. I am the insurance company, my insured says, "Oh, heck, I didn't recognize this service of process, I didn't recognize this phone call, this letter," on and on.

THE COURT: Yeah.

MR. RUSH: But, "And, by the way, there is an entry of default against me and there is going to be a judgment entered unless you do something."

THE COURT: Yeah. Right.

MR. RUSH: All right. The amount of the default judgment really is immaterial, except so long as it is for at least a million bucks.

THE COURT: Yeah. Right.

MR. RUSH: Because the insurance company is looking at a default with a prospective judgment of one million dollars.
THE COURT: Yeah.

MR. RUSH: The fact that there is a default sitting there has to be one of the considerations that the insurance company takes into account in determining whether to throw in the policy limits or not.

THE COURT: Educate me in regard to insurance law, because I am not that up on it. How does an injured plaintiff who has taken a default judgment against somebody who has provided no notice to the insurance company of the claim before that default judgment is taken, how does that plaintiff now get -- go after the insurance company?

MR. NEVIN: They have an 11580 direct action which provides that in the event of personal injury judgments or property damage judgments the insurer can be directly sued, so it is a direct , actual statute . In that action, the carrier has

the same defense that it would have at any coverage dispute and same factual defenses back to square one on it's policy back to square one on no notice and it raises it's defenses and does what it wants to do in that action.

THE COURT: That is more or less what I thought probably the situation was, because, obviously -- well, you have two things: You can't have a collusive defendant who is anxious to have the plaintiff recover and unload it on the insurance company, but there has t o be a way for an injured plaintiff to get at the insurance company since insurance is required. Whether there is a collusive defendant or not, just somebody who hasn't looked -- has adequately notified the insurance company and the insurance company aught t o be able to defend on the merits. So, anyway, what that brings me to is even with the default judgment -- and this has been my thinking all along -- even with the default judgment, Farmers is not on the hook for a default judgment unless they have been notified and have had an opportunity to defend, and they still don't payout a million bucks just to make somebody feel good. A million bucks is a million bucks and if they feel there is liability , then there is some reason for paying a million bucks. But, certainly to make a bankrupt vender feel good, that just --

MR. RUSH: No, that is not the issue at all . The issue is what is going to happen to this insurance company? It has nothing to do with making the vender feel good. The f a c t is --

THE COURT: Well , they are not on the hook, they will have to defend the action.

MR. RUSH: The insurance company is on the hook, because the posture that they get it in is with a default already entered against their insured.

THE COURT: But without any notice to them they still have a right to defend on the merits.

MR. RUSH: What is the difference between that and Hoffinger who has been asked to pickup a defense from someone who has already allowed a default judgment to be entered against it without any notice to Hoffinger? Why is Hoffinger suddenly --

THE COURT: Hoffinger is not on the hook until somebody establishes liability, that is why we're in this lawsuit.

MR. DAVIS: Hoffinger gets to defend too.

MR. RUSH: But Hoffinger has rejected the tender and that is one of the issues, one of the points Mr. Nevin wishes to make, and I am saying a reason to reject the tender is because the person you are being asked to defend has already got a default judgment against him. We are in the same position, looking at it, and that was with no notice to us, we're in the same position as you have described the insurance company is in.

MR. DAVIS: But you didn't need to indemnify, you had the same defenses you always had.

MR. NEVIN: The approach, in my view, is that if we were a sitting Judge and there was nothing that could be done and it was a matter of what would happen to this soon to be bankrupt company, why did they send me the defense manual? Which is what they did. The fact is that Hoffinger has a policy of giving you no authority to settle, we all know that, giving every defense attorney no authority, fighting and resisting every aspect of discovery, confusing the issues, which we have done for three days, and it is the corporate attitude, "If you want to open up the default judgement and bring out Norm Moss, if that is what you want to do, why don't we do that. We'll have Hoffinger, you want to go into that, we'll be here for months." The fact is, my expert will say this: That the default judgment is immaterial to the obligations on the carrier when confronted with this claim.

They have an obligation to independently evaluate if there is a liability, they have a duty to investigate obtain records, they are charged with the knowledge of California product liability law, they understand verdict ranges they have a quadriplegia case and evidence that the liner didn't have decals, and they have experts telling them that means potential liability. And, that is what he will say, and if he is voir dired on the issue of what was the effect of the default judgment, he will say it wouldn't have even been in their mind. They have to look at it objectively as a risk, and there is a lot of permutations about where it would go, but for the purposes of meeting a policy limit demand in a product liability case where we have a product that is questionable, they did the right thing and we then pass it off to you. I know what it is really about, is you don't want "happy hunting" in there, because it brutalizes your company, and I understand that, but that is why I put it in opening statement and, that is, it is inflammatory, but it came from general counsel.

MR. RUSH: Well, then let's don't leave out the part about after reading your letter and the demands made therein in light of what you told me regarding the current status of this case, because that gives some sort of substance to "happy hunting." In other words, you can't have it one way only.

MR. NEVIN: I would agree to do that if we can find a copy of that letter.

THE COURT: My problem is: I have a deadline. This case has to be decided before a week from Saturday, because there is some of the jurors are out of here and I am out of here and we don't have time to spend going into a wail of a lot of time on a matter which I consider a very peripheral importance, which is the default judgment.

MR. RUSH: We have plenty of time, we're going to easily be arguing this case Monday morning, so there is no problem here timewise. I think we can all agree to that.

THE COURT: The way things have gone.

MR. FLAHERTY: Famous last words.

MR. NEVIN: It is very likely I will rest today.

MR. RUSH: And I have one day at most.

THE COURT: It is like law and motion calendar when you are asking people to give their time estimates, you always double it.

MR. RUSH: Yes. Sitting on Wednesday, August 15th, plaintiff has rested, cross-complainant is likely to finish his case today, I will finish my case in one day, that is ten days before our deadline.

MR. FLAHERTY: What about instructions?

MR. RUSH: Well, it doesn't take ten days to instruct and argue. My point is, we are not up against it timewise.

MR. NEVIN: If I unstripe that letter and it opens the door as to the status of McMasker and any evidence comes in as to that, the door starts to crack open as to the default judgment and we have ourselves a real risk of finishing on time.

MR. RUSH: Well, I just think it is patently unfair to strike out that portion of someone's letter.

THE COURT: I don't mind if that portion goes in so long as we do not go into the default judgment.

MR. NEVIN: Yeah, I don't either.

MR. DAVIS: If you ask him why about that sentence, you are trying to go into the default, we know that.

MR. RUSH: I think that not allowing me to get in default is, with all due respect to the Court, is potentially reversible, because it takes everything out of context. But, the Court's ruling is the Court's ruling.

MR. NEVIN: Now, let's think logistically how we get that in. I don't know that I have another copy of that.

MR. RUSH: I have a copy I can make for you.

MR. NEVIN: Since we're all together, I will give you what I will mark first in my testimony today. This is a demand letter that was sent to Farmers that caused my retention and there is evidence of a default judgment, and I am going to redact, but I want to redact it with you present.

MR. DAVIS: And, while he's reading that, your Honor, I believe I have forgotten to move a couple of pieces of evidence in while I seek the Court's leave to reopen in your chambers. I don't think the jury has to hear what I admit and don't admit, and I move to admit the items that are not -- are you there, Stacy?

MR. OSMUNDSON: She is going to get the exhibits.

THE CLERK: Hi.

MR. DAVIS: What is left?

THE CLERK: You have 45.

MR. DAVIS: Which is?

THE CLERK: The curriculum of Dr. Ralph Johnson.

MR. DAVIS: The CV.

THE CLERK: 49 and 50, computer example of, "Danger, no diving" sign. And then the two pages of installation guide of Coleco.

THE COURT: And, incidently, the liner is 52.

MR. OSMUNDSON: I think you are right, your Honor.

THE CLERK: The pool liner is 52, but you admitted that one already.

THE COURT: You referred to it as 57 once in there today.

MR. DAVIS: Sorry.

THE COURT: One other thing is: Not in there was an objection and that was that revised with the handwritten note
(1581) [BREAK]

case brought by Leesa Bunch?

A. I was.

Q. And when were you first retained?

A. In September of 1998.

Q. And can you describe -- strike that. Was there is demand of some kind made at or around that time -- at or around the time of your retention?

A. Yes, there was, there was a one million dollar demand that had been issued to Waterworks and to their carrier in connection with injuries of Leesa Bunch.

Q. And did you notify Hoffinger, the manufacturer, of that claim?

A. I did.

MR. FLAHERTY: Your Honor, would you like to see? These are the same exhibits we had in chambers.

THE COURT: Okay.

MR. FLAHERTY: Q. Mr. Nevin, I am handing you Exhibit 15, which is a November 2, 1998 letter -- actually, three copies of a similar letter. Would you take a look at these and tell me whether you recognize them?

A. Yes, I do.

Q. All right. And can you tell the jury what those are?

A. These are letters that I wrote to the various agents for service of process at Rancho Cucamonga and -- yeah, all three different defendants notifying them of the pendency of the civil action for damages that a 16 year old quadriplegic has a case pending and that we were demanding that they defend us and indemnify us as the retailer versus the manufacturer.

Q. And acts for service of process for who?

A. For Golden West Marketing and Doughboy Recreational Incorporated.

Q. All right. And did you receive a response to these tenders?

A. I did.

MR. FLAHERTY: Your Honor, I would offer 15 at this time.

THE COURT: That will be received. (Cross-Complainant's Exhibit 15 was received into evidence at this time.)

MR. FLAHERTY: Q. Mr. Nevin, handing you Exhibit 16, this is a November 10, 1998 letter on letterhead of Norm S. Moss addressed to you. Do you recognize it as such?

A. Yes, this is the letter that was sent back by the lawyer for Hoffinger.

Q. All right.

A. This is in response to my tenders.

MR. FLAHERTY: Your Honor, I would offer 16 at this time.

THE COURT: That will be received.(Cross-Complainant's Exhibit 16 was received into evidence at this time.)

MR. FLAHERTY: Q. And did you, in turn, respond to Exhibit 16?

A. I did.

Q. Handi g you Exhibit 17, this, again, is a series of three letters to the parties you have identified as agents for service of process. Would you tell the jury what it is you have before you as Exhibit 17?

A. This is my second letter to Golden West, Doughboy. Again, Golden West, their agents for service with a carbon copy to their lawyer, Norman Moss in Orlando, Florida inviting them to participate in a mediation in California.

MR. FLAHERTY: And, your Honor, I would offer 17 at this time.

THE COURT: That will be received. (Cross-Complainant's Exhibit 17 was received into evidence at this time.)

MR. FLAHERTY: Q. And did you receive that response to Exhibit 17?

A. I did.

Q. Handing you Exhibit 18, which is a letter dated November 16, again, on Norman Moss letterhead, would you tell the jury what you recognize that as?

A. This is Mr. Moss's response to my request for mediation declining the invitation.

MR. FLAHERTY: I would offer 18 at this time, your Honor.

THE COURT: And that will be received. (Cross-Complainant's Exhibit 18 was received into evidence at this time.)

MR. FLAHERTY: Q. Mr. Nevin, the demand that you made reference to, the policy limits demand, did counsel for Leesa

Bunch extend the time for Farmers to respond to that settlement offer?

A. He did.

Q. And was a decision made by Farmers to resolve the claim made by Leesa Bunch?

A. It was.

Q. When and for how much was that decision made?

A. I think it was near Christmas of '98, I am not precisely in touch with that date. I know that they paid over the funds in March of the following year, March of '99.

Q. And handing you what has been marked as Exhibit 19, which is a March 4, '99 letter on your letterhead with some accompanying documents, would you describe to the jury, please, what that is?

A. Right. This is a transmittal from my firm to Whitney Davis's firm with a million dollar check in the mail, proof of service by Federal Express.

Q. And did Farmers Insurance then fund the settlement for the amount of one million dollars?

A. They did.

Q. And was a lawsuit then filed against Hoffinger for indemnity?

A. It was, about a month later.

MR. FLAHERTY: All right. I would, to the extent I didn't already do it, I will offer 19, your Honor.

THE COURT: That will be received. (Cross-Complainant's Exhibit 19 was received into evidence at this time.)

MR. FLAHERTY: And, I have nothing further at this time .

THE COURT: Mr. Davis?

MR. DAVIS: Nothing.

THE COURT: Mr. Rush?

CROSS-EXAMINATION

MR. RUSH: Thank you. Your Honor, I am going to be offering the pleadings in this case, first, the Complaint.

THE COURT: All right.

MR. RUSH: I show you Defendant's 11, that would be a copy of the Complaint in this matter.

A. It appears to be.

MR. RUSH: And then, your Honor, an amendment to the Complaint would be next in order.

THE COURT: All right. (Defendant's Exhibit JJ was marked at this time.)

MR. RUSH: Q. Mr. Nevin, take a look at JJ. Would that be the first amendment to the Complaint?

A. Yes. (Defendant's Exhibit KK was marked at this time.)

MR. RUSH: Q. And then the second amendment to the Complaint, KK, would be a copy of the second amendment to the Complaint.

A. It appears to be. (Defendant's Exhibit LL was marked at this time.)

MR. RUSH: The third amendment to the complaint, Mr. Nevin, I am showing you LL and represent to you that is the third amendment I received in the mail, it does not have an endorsed filed stamped on it, but you can see it was served on October 26th, 1999. Would that appear to be a correct copy of the third amendment to the Complaint?

A. Yeah, this looks like the third amendment aspect.

MR. FLAHERTY: Your Honor, may I take a look at those and see the exhibits before they are handed to the witness.

THE COURT: Yes. Uh-huh.

MR. RUSH: My apologies, counsel.

MR. FLAHERTY: It is okay.

MR. RUSH: Q. And then, finally, the answer of Hoffinger Doughboy and Golden West to the third amended Complaint. (Defendant's Exhibit MM was marked at this time.)

MR. RUSH: Q. Showing you MM, does it appear to be the answer of Hoffinger Doughboy and Golden West to the third amended Complaint?

A. It appears to be, yes.

Q. Okay. So referring to -- And, may I approach, your Honor? I am sorry.

THE COURT: Yes.

MR. RUSH: Referring to the Complaint itself, when was that filed?

A. May 1st of '97.

Q. And is -- among the defendants do you see Waterworks or McMasker?

MR. FLAHERTY: Your Honor, counsel is examining the witness from exhibits that are not in evidence and asking the witness the substance.

MR. RUSH: I believe they are in evidence, your Honor.

MR. FLAHERTY: I wasn't aware they were.

MR. RUSH: I am offering them in evidence, they have been identified, they are part of the court record.

THE COURT: Any objection?

MR. FLAHERTY: May we approach, your Honor?

THE COURT: All right. (Bench conference, not reported)

MR. FLAHERTY: Your Honor, for the record, I did object to the admission of the documents on both relevance and foundation grounds and it is my understanding those objections are being sustained.

THE COURT: At the present time, yes.

MR. FLAHERTY: Thank you.

MR. RUSH: Q. When you first -- I think you said you first got notice of this case in September of 1998; is that correct?

A. I think that is right.

Q. And had any of the discovery in the case been taken at that time?

A. It had.

Q. Would it be correct that a number of the depositions of the percipient witnesses had already been taken?

A. Yes.

Q. Would it be correct that the depositions of Rene Breeding, Travis Breeding, Tyler Breeding, Tyler and Travis' dad, Beleta Bunch, Leesa Bunch, Terry Bunch, Joseph Frank, Loretta Frank, and Robert Lee Royce were all taken before you had notice of the case?

A. That sounds accurate.

Q. Did you have an opportunity to review all of those depositions?

A. Yes.

Q. When did you do that?

A. In the months after the initial tender by Mr. Davis.

Q. When, again, was the one million dollars paid?

A. March.

Q. Of what year?

A. '99.

Q. So did you obtain and review all of those documents in the period between September of '98 and March of '99?

MR. FLAHERTY: Your Honor, may we approach?

MR. RUSH: Q. Your first notice of the claim to the present defendants in this case was your letter of November 2, 1998 which you sent to three different parties; is that correct?

A. I agree with that, yes.

Q. And then apparently there was a response from Mr. Moss to that November 2, 1998 letter on November 10, 1998; is that right?

A. That is sight.

Q. Now, in that letter Mr. Moss says, "After reading your letter and the demands made therein, in light of what you have told me regarding the current status of this case gives me cause to be reluctant in coming to your defense in this matter; is that correct?

A. That is what he said.

Q. Now, as of November -- between November 2 and November 10, 1998, I take it with Mr. Moss?

A. We must have.

Q. And did you give him you had a any inform phone conversation ation in your letter of November 2 about the merits of the case?

A. I did.

Q. That there was a young girl who is now a quadriplegic and she is claiming damages?

A. Well, I would have to look at the letter to see what else is in there, but I know I said that.

Q. So, basically, you relate the claim -- I am talking about the merits of the case?

A. No, the merits were not discussed. It was a retail tender to the manufacturer for the manufacturer's product.

Q. All right. Now, had you by the time you had your conversation with Mr. Moss between November 2 and November 10, 1998, had you reviewed any of the depositions of the percipient witnesses in the case?

A. Yes, I had reviewed depositions, retained experts, met with counsel, examined all of the medical records, or most of them, and was in an ongoing review of this claim as it was coming in.

Q. And did you relate to Mr. Moss in that conversation the details from these various depositions?

A. I don't recall what I said to Mr. Moss, but it would not have been of my practice to describe for him the testimony of each witness through the depositions. I am certain that I conveyed to him the fact that I was -- I had great concern about the case as it was standing.

Q. At that point in time, had you secured from your client -- well, let me back up. Who was your client at that point?

A. Waterworks.

Q. At that time had you secured from Waterworks any written documentation they had about the sale of this liner in question to Mr. Frank?

MR. FLAHERTY: I'll object on the ground it is vague as to time. I am not sure what the time is that counsel is referring to.

THE COURT: We are talking about this up to November 10.

MR. RUSH: Yes.

MR. FLAHERTY: Thank you.

THE WITNESS: I don't recall if I received any document from them.

MR. RUSH: Q. Have you ever received any documents from your client that would pin down the date that this transaction took place, i.e., the purchase of the liner by Mr. Frank?

A. No.

Q. So I take it it would also follow that you never provided to Doughboy or any of its affiliates this information?

A. That is correct.

Q. At the time that you spoke with Mr. Nevin -- excuse me, with Mr. Moss, had you identified this liner as to the manufacturer?

A. We had a real good idea.

Q. So you had not identified it in terms of any documentation or any expert going out and looking at it and saying, "This is a Doughboy liner."

A. That is correct.

Q. Now, in connection with that discussion that you woulc have had with Mr. Moss prior to November 10, did you tell

Mr. Moss that the liner carton was open at the time Mr. Frank purchased it?

A. No.

Q. Would that be a material piece of information to someone who was being asked to accept the tender?

A. Speaking from someone who has asked to accept it, I don't know what the -- whether it would have changed or not.

Q. If you were having such a tender presented to you by a retailer who told you that the container from the manufacturer had been open prior to sale, would that have an effect on you as an attorney?

A. You mean using my own legal reasoning and my work product and the thought processes of counsel, is that what you are asking?

Q. Not from this case, in general terms.

MR. FLAHERTY: In that case, I will object on the ground it calls for an expert opinion and also calls for speculation.

THE COURT: I'll overrule that.

THE WITNESS: If I were the manufacturer of a product and I received a tender for my product, I would immediately investigate and find out what the specifics were, especially with a huge injury case many, many miles from my corporate headquarters.

MR. RUSH: Move to strike as non-responsive, your Honor.

THE COURT: Overruled, we'll leave it in.

MR. RUSH: Q. The question was: Would you be effected -- would your analysis be effected by the knowledge that the product that you, as a manufacturer, are being questioned on

was opened before it was given by the retailer or sold by the retailer to the consumer?

A. Not at the tender stage. I think when you get a tender as a manufacturer, I believe you would investigate. And, opening of a package may mean nothing, it is an -- if it is my product and someone has been injured on it, I would investigate.

Q. Did you know at the time that you made this tender what or whether there was any kind of a packet that would typically go with the liner or not?

A. No.

Q. So you knew none of that information?

A. Well, I take it back. What I knew was that the pool was lacking decals and I knew that decals were required according to a variety of standards and I was concerned about that and I also understood at the time that there was testimony that the Franks had not applied the decals, so the condition of the package I didn't know.

MR. RUSH: Okay. No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

MR. FLAHERTY: Yes. Just a couple, your Honor.
(Questions passed from a juror.)

MR. FLAHERTY: Q. Tender isn't only what a steak should be, is it? Could you explain to the jury what a tender is?

A. A tender, it is a funny word in the law that we use when we have an obligation or notice that we want to serve on another party. You tender your defense or in employment you hire people tendering their resignations, is where you hand off and ask one else to pond to something, and in this business we call it a tender of defense and indemnity, or

from Mr. Davis it was a tender of a demand for the payment of a policy. Funny lawyer talk, I guess.

Q. Now, you testified a moment ago that in response to counsel's examination, that upon receipt of a tender of indemnity, such as the one at issue here, a comprehensive investigation would be in order; is that correct?

A. I would think that would make sense.

Q. And the tender in this case that you sent was sent on what date?

A. November 2nd of 1998.

Q. And the response that you got from Mr. Moss -- by the way, who is Mr. Moss?

A. He identified himself as the general counsel for Hoffinger Industries, which is their lawyer.

Q. All right. And the response from Mr. Moss declining the tender came how many days later?

A. Well, I sent mine on certified mail on -- on the 2nd. He had a declination to me by the 10th. So a little over a week.

Q. Do you have any knowledge what kind of investigation was done in that eight-day period?

A. As far as I know, there was no investigation.

Q. Did he ask you for the depositions or any of the documentations in the case?

A. No. He told me to --

MR. RUSH: I think the question is answered.

THE COURT: Yes.

THE WITNESS: Is it? Sorry, am I meandering? I don't mean to.

MR. RUSH: I think the question is --

THE COURT: So far as you know, was there any investigation? And the answer was, "No."

MR. FLAHERTY: Yeah.

Q. Mr. Nevin, read to the jury, if you would, what Mr. Moss did tell you with particular emphasis on the last sentence of the letter. A. Well, he said at that point there is nothing more that either of us can do to move this matter along, so with that in mind "happy hunting".

MR. FLAHERTY: Nothing further, your Honor

MR. RUSH: Nothing further.

THE COURT : Anything?

MR. DAVIS: Well, we were asking Mr. Nevin what he would do?

THE WITNESS: I am not answering your question.

MR. DAVIS: All right.

MR. NEVIN: McMasker calls Theodore Bolling.

THEODORE D. BOLLING, JR.,

called as a witness by the Cross-complainant, was sworn and testified as follows:

THE CLERK: You do solemnly swear that the testimony you shall give in the matter now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: I do.

(1607) [BREAK]

A. Yes, I believe it does.

Q. And I believe that you did mention the other day, you were shown Defendant's A and you said that you did recognize the outer envelope?

A. Uh-huh.

Q. Is that correct?

A. Yes.

Q. Now, you were asked about whether there were any warning labels in the package; is that correct?

A. Yes, you asked me about it.

Q. Okay. And in terms of probabilities, is it more probable than not that there were warning labels in there?

A. I couldn't say there were or there weren't, I just remember the outer package that stick in my mind that I saw that, contents of which I really don't know what all was there.

Q. All right. So there may have been warning labels, there may not, you just can't say with any confidence?

MR. NEVIN: Objection. Leading.

THE COURT: Overruled.

MR. RUSH: Q. Is that correct?

A. Yes, that is correct.

Q. Did you fill out and send in a warranty?

A. I don't believe I did. I never was much on warranties, especially on pool liners. I have had several and they had always lasted 10 to 12 years, which is about what the warranty was, and so I never figured it was worth it.

Q. Did you ever go back to Waterworks or Doughboy or anywhere and ask for any safety labels?

A. No, I did not.

Q. So would it be correct that you didn't add any additional warning labels to the pool beyond those that came with the Coleco frame?

A. That is correct.

Q. And why is that --

MR. DAVIS: Objection.

MR. NEVIN: Objection, your Honor, this is the 801 issue that came up earlier asked the same question of Mrs. Frank eight days ago, the Court sustained that objection under 801.

MR. RUSH: I don't even know what you are talking about.

MR. NEVIN: Well, I will tell you what we are talking about.

A JUROR: Well, I have a question. (The following proceedings held at the bench:)

MR. RUSH: My offer of proof is that Mr. Frank chose not to put the labels on the pool because he felt that what he had on there already was adequate.

THE COURT: And the objection is the adequacy and the warning is a matter of expert opinion?

MR. RUSH: But the adequacy of warning is a jury question. These are lay people, they can have the same, it is not just for an expert.

THE COURT: I know that, but it is asking for the opinion of this particular lay witness and the opinions of lay witnesses are not admissible.

MR. NEVIN: That is for, "How far was the car going" "Was it dark or not dark" it is not, "What did you think about the ultimate issue of the facts of the case."

THE COURT: As a general rule, opinions of lay witnesses are not admissable. (The following proceedings held in open court in the presence of the jury:)

MR. RUSH: Q. Mr. Frank, did you put any additional stickers anywhere on the pool or the liner after you bought the frame from Royce's?

A. No, I did not.

Q. And so the stickers we have been looking at, for example, Plaintiff's 6, the sticker on the inside edge, railing, that was already there when you got it?

A. Yes.

Q. And the sticker now warn away, but the one that said "caution, no diving, no jumping" that was already on there?

A. Yes, it was.

Q And did you choose not to put any additional labels on because they weren't i n the package?

A. I can't state that they were or weren't in the package, I don't recall whether they were there .

MR. RUSH: Thank you very kindly.

THE COURT: Cross?

CROSS-EXAMINATION

MR. DAVIS: Q. Mr. Frank, with regard to the prior purchaser, the intended purchaser of that liner , you said there was a couple of weeks of a period. I wanted t o ask you: Is that a couple weeks between the time he rejected the liner or didn't want it and that you came in with your cash or was it a couple weeks ago that they got it in; do you remember what the two weeks meant?

A. Not specifically. I believe he told me they had got the liner in a couple of weeks before they had ordered it for another gentleman and then he never showed up to take it or he called and said that was the wrong size or something and he no longer needed it.

Q. And you bought it some time before April 10th. I will show you Plaintiff's Exhibit 40, your check register .

A. Yes . The check was not dated in the register , but the check behind it was April 10th, so it would have been before that .

Q. Okay. So at a minimum we can count back two weeks from April 10th?

A. Yes . I believe if you go back in the register to the

(1665) [BREAK]

or anything like that?

A. No. It simply looked like the tape at the top had been opened for whatever reason.

Q. So all we're talking about here in the box was opened is that there is a strip of tape that is supposed to hold a flap down that was, in fact, opened?

A. That is correct.

Q. That is the whole deal?

A. Yes, sir.

Q. And it has been a long time, so it is probably hard to remember, but it seems t o me that -- I mean, in your deposition and in your trial testimony I think we're pretty clear that you saw, at least saw this thing, this big ziplock baggy?

A. Yes.

Q. There is no real doubt in your mind that that was there and that this Doughboy liner information package front sheet was a t least there, right?

A. Yes, sir.

Q. Then you have no reason to believe that or heard from no source that anybody at Waterworks in Chico decided to take out a warning label out of the package?

A. No, I don't.

Q. Did you or any person after your trial testimony here last week, sir, look at your 1989 checkbook t o see whether or not you had written another check in 1989 to Waterworks?
(1668) [BREAK]

pool.

Q. So you had a distinct impression that not only was Mrs. Frank saying "no diving," but that there were labels on the pool that said the same thing?

A. Yes.

Q. Now, let's focus on the date of August 13, 1993, which is the day that Leesa's incident occurred. Do you recall being there that day?

A. Yes.

Q. And who all was there on that day swimming?

A. Leesa, myself, my brother, and Erick, and Loretta.

Q. And how did -- do you recall how everyone happened to be congregating over there that day?

A. I remember we were out playing that day and we just decided to go over there and jump in the pool.

Q. You say, "Jump in the pool," what do you mean?

A. Go swimming.

Q. Did you physically jump in the pool or how did you enter the pool?

A. You just kind of hop in, you don't really jump in.

Q. Now, was that okay as far as the Franks' rules were concerned?

A. Yeah.

Q. Yes?

A. Yes.

Q. On that day, did you dive in the Franks' pool?

A. No, I didn't.

Q I beg your pardon?

A. No, I didn't.

Q. Did Leesa dive in the Franks' pool that day?

A. Yes.

Q. How many times total did you see her dive?

A. I believe twice.

Q. About how long had you been there just approximately when you saw Leesa dive the first time?

A. 10, 15 minutes, maybe.

Q. Was Mrs. Frank present at that time?

A. Yes.

Q. Would you describe that first dive of Leesa's that you saw, please?

A. Well, she climbed up on the bench alongside the pool and she dove off head first with her hands up out in front of her.

Q. And did she appear to be hurt in any way as a result of that dive?

A. No, she didn't.

Q. What if anything did Mrs. Frank do with reference to that dive?

A. Well, she got after her about diving, told her that she doesn't want her doing it or else she wasn't going to be allowed to swim there.

Q. Did -- at some point did Mrs. Frank leave the immediate area around the pool?

A. Yes, she did, she went in the house.

Q. And did she say anything as to why she might be going into the house?

A. She said that she had to use the restroom.

Q. While she was gone, did Leesa do any additional diving?

A. Yes, she did.

Q. Now, at that point in time of the second dive, where were you located?

A. I was sitting on the bench on the side of the pool on the western end of it.

Q. There is a -- let's see, we had a diagram up here somewhere. Could you help me find it? It was the one that I think I first drew and then --

MR. DAVIS: It is folded all up in all of the other exhibits, just to help.

MR. RUSH: Q. To orient you, this is a rougher drawn map. This area is pointing to the north. The Bunch house here, Road 19 running east and west with your home here, and Drews Way running north with the Franks' home here and

the pool out in the back yard and then this is a blowup of the pool. Are you oriented there?

A. Yes.

Q. And were there two benches as shown here?

A. Yes.

Q. And which bench were you sitting on?

A. The northern one.

Q. This one up here?

A. Yes.

Q. And is that the same bench that Leesa had dived off when Mrs. Frank told her to knock it off early that day?

A. Yes.

Q. Now, the second dive which bench did Leesa get on?

A. The same one.

Q. Same one you were sitting on?

A. Yes.

Q. And what were you doing at that time?

A. Getting my clothes back on and tying my shoes.

Q. And were you able to see what Leesa did?

A. Somewhat out of the corner of my eye.

Q. And would you describe what you saw Leesa do on that occasion?

A. I saw her climb up on the bench and dive off.

Q. And did she just -- well, can you describe the dive in more detail, if you would, please?

A. Well, it appeared that she dove fairly -- she kind of jumped up and got some air. She didn't really dive outlying a shallow type dive, she landed fairly close to the edge of the pool inside the water.

Q. Would you describe the dive as more flat or more vertical?

A. More vertical.

Q. And how far away from the edge of the pool would you estimate she entered the water?

A. I would say a foot, two feet .

Q. What did you do a t that -- after that occurred? Or , let me withdraw that and simply say: What happened next.

A. Well, I guess it was a few seconds that had gone by and I noticed she hadn't come up yet, and so I went t o the edge of the pool and I saw that she was laying on the bottom and I yelled for her brother Erick t o come over and bring her up, see if she was okay.

Q. Now, where was Erick located at that moment?

A. He was in the pool on the southern most end.

Q. Okay. Was anyone else in the pool other than Erick when Leesa made that second dive?

A. I believe my brother might have been at the time.

Q. Do you know whether he saw Leesa dive?

A. I don't know.

Q. What did Erick do when you hollered over to him?

A. He came over and picked her up and she was just kind of hanging in his arms and I believe she said something along the lines of "help me" and he said, "Oh, well , she is just messing around," and dropped her again.

Q. Now, when you say that he came over, he was in the pool, how did he get over to her?

A. He walked through the water.

Q. The pool was shallow enough for him to just walk over to her?

A. Yes.

MR. DAVIS: Leading, your Honor.

MR. RUSH: Q. And after the first time that he said, "Well, she is just fooling around or kidding," and dropped her, what happened next?

A. I told him to go back down and get her, because I didn't feel that she was all right, and he did so.

Q. Now, when you first saw Leesa on the -- was she on the bottom of the pool?

A. Yes.

Q. And how far would you estimate she was from the edge of the pool when you saw her on the bottom of the pool?

A. It had to have only been one to two feet.

Q. When he dropped her, Erick dropped her and you said, "No, this may be serious," or words to that effect, what did he do?

A. He went back down and brought her back to the surface, then I grabbed her and pulled her out of the pool.

Q. And pulled her up onto the deck?

A. Yes.

Q. And did help arrive at that point?

A. Yeah. Um, after that I ran in the house and told Loretta to call 911 and then help arrived shortly afterwards.
(1683) [BREAK]

with reference to the second dive you were asked:

Question: "Was it essentially like the one you had seen her do earlier that day?"

Answer: "I believe so."

Do you remember that question and that answer?

A. Yes.

Q. Was that an accurate answer?

A. Yes.

Q. So I just want to make sure in my mind you saw her do a dive earlier in the day where she went up. You saw her go up and drop within a foot or two of the edge of the pool?

A. Yes.

Q. So it was almost like a suicide dive almost? I mean, if she goes -- look here. She is on a bench and you see her go straight up and drop. Let's see, I have twelve inch shoes, is that right, so that is about two feet according to my shoe length. Can you look at that?

A. (Witness looking)

Q. Do you agree that is two feet?

A. Yes.

Q. Now, for a person to stand here and go up and land two feet down not being Greg Lagunas, the Olympian, they really have to get a lot of lift and slam straight to the bottom of the pool, don't they?

A. Yeap.

Q. You saw that happen?